No. 11,384

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH LANE, HENRY E. REED and STANLEY SMITH, partners doing business under the firm name and style of Reed and Lane, Plumbers, Heaters and Sheet Metal,

Appellants,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as The Ranch, and the FIRST NATIONAL BANK OF FAIRBANKS, ALASKA,

Appellees.

Appeal from the District Court for the Territory of Alaska, Fourth Division.

BRIEF FOR APPELLANTS.

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Subject Index

Table of Authorities Cited

Cases

Rules

Statutes

Texts

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JURISDICTION AND STATUTES INVOLVED.

This action was instituted by complaint filed in the United States District Court for the Fourth Division for the Territory of Alaska, and was based upon the

statutes and laws of the Territory of Alaska generally and more particularly Sections 1982, 1987, 1989, 1994, 2081, and 2093 of the Compiled Laws of Alaska, 1933, as amended by the Session Laws of 1935, page 97. The relevant parts of said statutes are as follows, to-wit:

"Sec. 1982. Who entitled to lien on structures, etc., machinery and lands. Every mechanic, artisan, machinist, contractor, lumber merchant, laborer, teamster, drayman, and other person performing labor upon or furnishing material of any kind to be used in the construction, alteration or repair, either in whole or in part, of any building, wharf, bridge, flume, fence, machinery or aqueduct, or any structure or superstructure, shall have a lien upon the same for the work or labor done or material furnished at the instance of the owner of the building or other improvement or his agent."

"Sec. 1987. Lien claim to be filed when. It shall be the duty of every original contractor, within ninety days after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer, or other person save the original contractor, claiming the benefit of this article, within sixty days after the completion of the alteration or repair thereof, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the recorder of the precinct in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with

the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien sufficient for identification, which claim shall be verified by the oath of himself or of some other person having knowledge of the facts."

(This section amended in 1935, giving ninety days to mechanics, artisans, laborers, etc.)

"Sec. 1989. Foreclosure within six months; exception. No lien provided for in this article shall bind any building, structure, or other improvement for a longer period than six months after the same shall have been filed, unless suit be brought before the proper court within that time to enforce the same, or, if a credit be given, then six months after the expiration of such credit; but no lien shall be continued in force for a longer time than one year from the time the work is completed by any agreement to give credit."

"Sec. 1994. Foreclosure. Actions to enforce the liens created by this article shall be brought before the District Court, and the pleadings, process, practice, and other proceedings shall be the same as in other cases. * * *.

In all actions under this article the District Court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees. All actions to enforce any lien created by this article shall have preference upon the calendar of civil

actions brought before the District Court and shall be tried without unnecessary delay.

In all actions to enforce any lien created by this article all persons personally liable and all lien holders whose claims have been filed for record under the provisions of section 1987 shall, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien may, be made parties; but such as are not made parties shall not be bound by such proceedings. The proceedings upon the foreclosure of the liens created by this article shall be, as nearly as possible, made to conform to the proceedings of a foreclosure of a mortgage lien upon real property."

"Sec. 2081. Employment deemed continuous; when. The fact that any lien claimant may have been employed at different kinds of labor or at different rates of wages during the period of his general employment, shall not be deemed an interruption of the continuity of his employment; and no temporary cessation of employment of the lien claimant under an understanding of resumption thereof within a reasonable time, shall be considered an interruption of the continuity of employment so as to cause the time to run within which the notice of the lien is required to be filed. (57-113-33)."

"Sec. 2093. Provisions of chapter to be liberally construed. The intent of this chapter is hereby declared to be remedial and its provisions shall be liberally construed. (69-113-33)."

To the plaintiffs' original complaint (Tr. p. 2) the defendants, George Gilbertson and Harvey Gilbertson, filed a demurrer, which was sustained by the Court, who gave as his reason for sustaining the demurrer that in paragraph 5 thereof, the allegation that the plaintiffs supplied work and material as aforesaid, of the value of $2107.24, was not sufficient, and stated that the words "reasonable and customary value" being omitted, made the complaint demurrable; and, also in paragraph 7, in the last three lines thereof, the complaint alleged that the defendants accepted said job as finished and promised to pay therefor, but have failed, neglected and now refuse to pay. The trial Court stated that it was demurrable because the complaint did not have these words therein, "the sum herein sued for." Then, in addition thereto, paragraph 9 in the original complaint alleged: "claim a lien upon said property by recording in the office of the recording district wherein said property is situate and said work performed and material furnished, to-wit: The Fairbanks Recording District." The complaint, however, contained an exact copy of the lien notice, showing that it was filed in the United States of America, Territory of Alaska, Fourth Division, Fairbanks Precinct. (Tr. p. 9.) The trial Court held that the complaint was demurrable because in paragraph 9 there was not a repetition of the words "Territory of Alaska."

Plaintiffs then filed an amended complaint and the defendants above named again demurred and the de-

murrer was sustained by the Court because the complaint did not contain the following:

> "All of said property being situated on the Richardson Highway near the Town of Fairbanks, Alaska, in the Fourth Judicial Division in the Territory of Alaska."

Then plaintiffs obtained permission from the Court to amend the amended complaint at the bottom of page 2, by adding the words "in the Territory of Alaska." After this was done, the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, filed their answer herein admitting that they employed plaintiffs to do certain plumbing, steam fitting and sheet metal work, and to furnish certain materials, including efficient heating plant to be used in the buildings and improvements situated upon the real property described in said amended complaint, for the reasonable price and value customarily paid in the town of Fairbanks, Alaska, and alleged, "and did not furnish all the materials necessary therefor." (Which was nothing more than a negative pregnant, and an ambiguous allegation which amounted to nothing.)

In paragraph 2 of the answer (Tr. p. 22) the defendants admitted that the last item of work and materials supplied by plaintiffs was so supplied on the 23rd day of December, 1944. However, after plaintiffs' evidence was in and they had rested, the Court permitted the defendant to amend by stating: "It may be amended to conform to the evidence." (See transcript of clerk filed herein at page 51.)

Now, in the certified transcript the date of 23rd has been scratched out by pen and the 16th inserted. (See paragraph 2 of the answer shown in the clerk's transcript filed herein.) But the answer as filed in the case by the defendants specifically alleges in paragraph 2, the following:

> "Answering paragraph 5, these defendants admit that the last item of work and materials supplied by plaintiffs was so supplied on the *23rd day of December, 1944,* and defendants deny all other allegations and each thereof contained in said paragraph 5, except the allegation that defendants were and are entitled to a credit from the plaintiffs in the sum of $677.46."

Then in paragraph 4, the defendants denied that the work and labor done and materials furnished by plaintiffs to the defendant were done and furnished in compliance with ANY oral contract between plaintiffs and defendants. (See answer, p. 23 of printed transcript.) And then contradict this denial in the same paragraph by alleging that the said contract contemplated a good, sound, first class job on the part of plaintiffs, and plaintiffs wholly failed to perform their contract in this regard, as heretofore alleged in paragraph 1 hereof. However, paragraph 1 makes no statement charging that the plaintiffs agreed to do a good, sound, first class job. To this answer a reply was filed. (Tr. p. 25.)

STATEMENT OF CASE.

In 1944, the town of Fairbanks was crowded with soldiers, contractors and their employees, and the defendants, George Gilbertson and Harvey Gilbertson, were building a road-house just outside of the city limits of Fairbanks, fall was coming on and due to the inclemency of the weather in this part of the world, it was imperative that some kind of heat be furnished, or they could not expect customers. The Walker Construction Company was engaged in building The Ranch buildings, and Mr. Lane, one of the plaintiffs herein, was taken out to The Ranch by Mr. Walker, and the defendant, George Gilbertson, informed Mr. Lane that he had been in his lifetime an experienced steamfitter and told Mr. Lane what he wanted done there. The two men discussed the extreme shortage of building material and especially heating equipment, discussed the basement which was then full of water, and it was agreed that the defendants would get the water out of the basement and dry it up so that a heating plant could be installed therein. With this in mind, Joseph Lane, a licensed and experienced steamfitter, recommended a hot water system in preference to a steam plant. This was agreed upon, providing some equipment could be found. However, the defendants could not, or did not dry the basement and later a lean-to was built at the side of the main building and then it became necessary to put in a steam plant instead of the hot water system recommended by Mr. Lane. A second-hand boiler was discussed, and was the only thing available

in Fairbanks at that time that could be found as a temporary heating plant for The Ranch. The defendant, George Gilbertson, asked the plaintiff, Joseph Lane, about what the charges would be, and this was all agreed upon between them, as to so much per hour for the men working, and $175.00 for the old boiler. There never was, according to the testimony, any agreement that the plaintiffs would put in a first class heating plant because both of the parties knew that was impossible and that the material for installing a first class heating plant could not be obtained at any price, but it was agreed that the plaintiffs would furnish the labor and the old second-hand boiler and do some plumbing and sheet metal work at the regular and customary prices charged by them at Fairbanks at this particular time.

Joseph Lane was called as a witness and testified that he was a member of the partnership of Reed and Lane, that he was taken out to Mr. Gilbertson's place by Mr. Walker, that George Gilbertson was at the time at The Ranch in the barroom, that was some time in August of 1944, that he had a conversation with George Gilbertson, that Gilbertson wanted a steam system put in, was going to put a boiler down in the basement, but his basement was flooded, that he advised him to put in a hot water job because it was more economical to operate, but nothing could be done until the basement was dried out. That Mr. Gilbertson laid out the fact that he wanted unit heaters there in the barroom and dance hall, said he would like to have Mr. Lane do the job when the basement

was dry. That he had a later conversation with him concerning the building of a lean-to on the outside to put the boiler in. They talked it over and could not get a hot water job in at that time and decided to go ahead and put in the steam job. That it wasn't practical to put in a hot water job that way. That Mr. Gilbertson sent his man over to haul the boiler sections to the lean-to. There was nothing said about supervision at that time. Later on Mr. Gilbertson had received the bill from Walker with quite a bit of supervision on it, and he told Mr. Lane he did not want any supervision on that job and told Mr. Lane that he had been a steamfitter. Mr. Lane further testified that all the work he did was help set up the boiler, that the rest of the work was done by employees furnished by the plaintiffs, and that George Gilbertson told them what to do and said he did not want supervision and supervision was cut off. That Mr. Lane furnished the men and what material Mr. Gilbertson came in and got or one of his men was sent after. (Tr. pp. 88, 89 and 90.) He then testified that he had a conversation with Mr. Gilbertson about the bill. There were some errors in the bill, that he and Mr. Gilbertson went over it, we went over all the material out there and changed the bill and thought that he and Mr. Gilbertson had reached an agreement, at least when they left each other everything was in good shape, so it looked like he was satisfied and so were we. (Tr. p. 90.) Then Mr. Lane further testified that they had the tickets out there, that these tickets were all gone over, he then identified all of the tickets

that he and Mr. Gilbertson had gone over, stated they were in the same condition that they were at that time, and that they are part of the regular records kept or the bookkeeping system at their place and a part of the timekeeping system made out each night, the original and first entries made. These tickets were then marked as Plaintiffs' Identification No. 1, by the clerk of the Court. He further testified that several changes were made in the tickets by them at that time and concessions were made to Mr. Gilbertson, and then went ahead and explained those concessions. That the bill as corrected and agreed upon that time by him and George Gilbertson amounted to $1429.76. Then these tickets as above identified were offered in evidence, and then a long objection was stated by Mr. Clegg, which was not a proper or legal objection at all. (Tr. p. 92.) However, the Court sustained this objection and denied the admission of the tickets.

Then Mr. Lane later testified that he sent a corrected statement which reflected the true condition agreed upon, by him and Mr. Gilbertson to the defendants. That this statement was based upon the corrected bills, time cards and invoices and adjustments allowed. He then identified the time cards, stated they were before Mr. Gilbertson and himself at the time the adjustments were made. Then Exhibit A was re-offered in evidence and Mr. Clegg objected by these words: "We make the same objection as heretofore, without repeating it." (Tr. p. 94.) The Court sustained the objection again and an exception was allowed.

Then Mr. Lane identified a statement that had been marked Identification No. 2, testified it was an exact copy of the statement referred to by Mr. Clegg as being given to the defendants. Then the amended statement was offered in evidence. (Tr. pp. 94 and 95.) Defendants objected on the grounds that no contract or agreement had been established as alleged in the complaint and this therefore is incompetent, irrelevant and immaterial, there is no testimony here showing there was any agreement reached as to what the terms of this alleged contract were or what was supposed to be done by the plaintiff in performance of the contract or what the terms of the contract were. This objection was sustained by the Court, exception allowed plaintiffs.

Mr. Lane then testified that it was a cost plus job, in other words, a time and material job because they were just hired to put in the work. "I told him at the time it was $3.00 an hour and he wanted me to go ahead with it, in fact, they sent down three men and insisted on getting the boiler in there." At that time we were very busy, we didn't get at it immediately when he wanted it, that was one of the reasons he sent his own men down after the boiler to haul it up there. We did the work in compliance with his request. That the itemized statements (Plaintiffs' Identification No. 2), show each item furnished and charged for, and all of the labor furnished and charged for. It shows the invoice capitulation. That was presented to him by Mr. Reed. After he (Mr. Lane) worked this out with Mr. Gilbertson he didn't talk

to him any more, that Mr. Reed talked to him after that. Mr. Lane was then asked:

> "Q. I see. Mr. Lane, was the items of labor and material that you have testified about here, were they all charged at the customary and regular price for labor of that kind in Fairbanks at that time?" (Tr. p. 96.)

This was objected to and the Court sustained the objection and an exception was taken. He then testified that he knew of his own personal knowledge that the material listed in the identification above referred to was actually used and went into the building involved here. That he and George Gilbertson went over the list piece by piece, went over the entire building and went over the hours of labor in the conference, made a few corrections therein, that Gilbertson kept a labor record and that plaintiffs' labor record did not exactly tally, that he made up the statement that was marked "This statement supersedes all other statements" and that the statement is exactly correct as agreed upon between the witness and Mr. Gilbertson. Plaintiffs' Identification No. 2 being the statement referred to, was then introduced in evidence and found in the certified transcript of the record filed herein at pages 242 and 243, and is set out in full on pages 98 and 99 of the printed transcript. And that the statement showed all the changes and credits claimed as well as the balance due thereon.

On cross-examination he testified that he helped do the work, there were four working there setting up the base and setting up the boiler. It would probably

take about two days or sixteen hours for four men, it would be four times sixteen that it would take in the way of hours, that he thinks that is about what it took to put it up. That the billing shows labor of mechanic 65½ hours, labor for helper 9½ hours, but that the header is quite an item on there, it is a four-inch pipe that has to join from one end of the boiler to the other, and then the main hooks into the top of it and runs across the side of the lean-to and around the corner in there and in bricking up the boiler on the inside as well, that's all included in that item there. (Tr. p. 100.) That the job was straight time and material, that when a party comes to us and wants us to do work for them and don't want us to state a set contract price, but just wants us to furnish time, labor and materials, that's a time and material job. In other words, we charge them for the time and material, there is no ten per cent plus charged. That the charge shown on the statement is a proper charge, that the men spent that much time, that Mr. Gilbertson sent his own men after lots of the material, that Mr. Reed is the plumber, that he had nothing to do with the boiler, that's as Mr. Gilbertson and I agreed upon it. The agreement was about the corrections made in the bill. (Tr. pp. 101 and 102.) The labor was correct and as per agreement. That the statement contained the words "as per agreement" and the meaning of those words was that an agreement was made between Mr. Gilbertson and Mr. Lane, including the corrections. That he agreed to put in a steam heating system, that he put it in, that he never

put in any other system there, so far as he knows it is still there, that he has never gotten paid for it. I understood that he was going to take it out and put the boiler in the basement at some future date when I put that one in there, whether he did or not, I don't know. That he first started working in October, he quit when the job was completed late in December, somewhere around Christmas time. He had a man there doing the work, that his name was Kling, who set the boiler up and run the header and mains and Mr. Wilcox finished up the job.

They used the boiler after we got some heaters hooked to it so it could be used, he saw it in operation many times, possibly a half dozen times. He was out there taking away some material along in January, couldn't give the exact date. We changed an oil burner while we were still working on it. This was done at Mr. Gilbertson's request. We got the boiler originally from the Alaska Airlines, it had been in use a good many years, it was an iron sectional boiler, that he took it in on a trade, that he tested it for capacity to heat a building of that kind. It was more than sufficient size. It is figured in the number of square feet of radiation it will handle and that boiler is capable of handling in the neighborhood of 1200 square feet. It is a low pressure, cast iron sectional boiler, is rated in the number of square feet of radiation it will handle, it was sufficient to handle two buildings like The Ranch. It was satisfactory so far as size was concerned, it was satisfactory when I left there.

There were two burners put in out there, the first one put in was a new burner, it was bought in Seattle from LaPere and Walker, we bought 4 or 5 of them, all we were able to get. Oil burners were hard to get at the time, and that was one of the four we got. We installed it. This burner was in there possibly three weeks, Mr. Gilbertson said it was too small. However, it was doing the work at the time, but he decided it ran a good time without shutting off and was too small and he wanted it out of there. Mr. Gilbertson and I made an agreement on an old burner. I told him at the time that the burner was an old one and that it was the only burner that was available in town. If he wanted the burner changed and if he wanted this old one that was in poor shape, I would put it in and at such time as he or I could get ahold of another burner I would allow him the price of that burner back and that was satisfactory. The $100.00 with return guarantee and when we put in another burner he was to return that burner and get $100.00 back. Mr. Gilbertson and I talked it over and he told me to put it in. I told him the old burner was the only one in town available. I told him it was an old burner at that time, I put it in at his instruction. He was the one who wanted it because he said the other was too small. (Tr. pp. 110 and 111.)

He was the man who was directing all this business, Mr. Gilbertson instructed me that, after he had trouble with Walker, and Walker's bill had a lot of supervision in it, if he told me once, he told me a dozen times he didn't want any supervision on that

job. Therefore he let Mr. Gilbertson do just as he pleased. That Lane assumed no responsibility after the boiler was set up, because from then on Gilbertson instructed him that he wanted no supervision.

Then Henry Reed was called and testified, that he was a member of the partnership of Reed and Lane, had been since its inception, he did some of the plumbing at The Ranch. The rest was done by his employees, he did all of it except 5 hours. He charged for the work at the regular and customary charges at Fairbanks, Alaska, at that time. He furnished some of the material and fixtures at the customary and regular charge being charged at Fairbanks, Alaska, at that time. That after the job was finished he had a conversation with George Gilbertson.

These questions were asked and the answers given as follows:

Q. There is a credit of $250.00 on here for returned material. What was that for?

A. Well, originally, that was for the purchase of a bathroom set, a complete bathroom set with prewar fixtures. We purchased the material from the Graehl Circle Bar for $250.00, and we quoted the price to George, and he was tickled to death to get it, and he paid for it at that time. He (287) was contemplating putting in the plumbing in a house adjoining the Ranch.

Q. Now, did he ever take those bathroom fixtures?

A. No, sir, he didn't.

Q. And is that what that credit of $250.00 is for?

A. That's right.

Q. Now, was the plumbing work that you did there all right? Was it finished when you got done with it, the part you did?

A. Yes.

Q. And are the charges you made there correct?

A. That's right.

Q. Now, have you ever talked to him about this bill that supersedes all previous bills? Are you using it, Judge?

A. I have a copy, sir.

Q. We have a copy. You may keep that. Did you ever go over that bill with George Gilbertson yourself?

A. Yes.

Q. And at what time did you go over it with him?

A. I believe that that was in January, sir. No, I take that back. I think it was after February.

Q. After February. And what was your purpose in going over it with him?

A. There was a lot of errors and mistakes. If I might go back a little bit——

Q. Yes, go back.

A. During the war—at the time, when the war was in progress, bookkeepers were at a premium. The government had taken all clerical help to speak of, and we had a man working for us by the name of Walt Calhoun, and Walt was not a full-fledged bookkeeper. He never professed to be, but he did the best he could, and Walt had taken care of the books to the best of his ability. However, there was mistakes, which anybody is liable to make. These mistakes were

taken up with Mr. Gilbertson by Mr. Lane, and the time cards and everything were gone over, and I went out to see George and Harvey about collecting the account, and at that time we went over it. (288)

Q. Was there any—was there something in there, any plumbing work in there, that he ever kicked about at all, or the charges for the plumbing, at that time?

A. I don't recall that George ever did complain about the plumbing.

Q. He didn't to you, anyway?

A. He didn't to me at all, no.

He then testified that he employed a lawyer and filed a notice of contractor's lien, the lien was then identified and introduced without objections which is shown on pages 144, 145, 146 and 147 of the transcript and made a part of this bill of exceptions by references; that he had been paid nothing since the filing of the lien; that the amount set forth in the lien was the correct amount of the indebtedness from George Gilbertson and Harvey Gilbertson, doing business as The Ranch, to himself and partner after all proper credits were given.

On cross-examination he testified that Calhoun was the bookkeeper, he didn't profess to be a full-fledged bookkeeper.

Then these questions were asked and these answers given, as follows:

Q. What difference was there in the bills that you furnished to Gilbertsons for this work and the revised bill that you say supersedes all others?

A. There is about $400.00, sir.

Q. Do you mean you increased the amount that you claimed to be due $400.00, or reduced it?

A. We reduced it, sir.

Q. Isn't it true it is greater than the original bill you sent him?

A. No, it isn't.

Q. Did you ever examine the original statement?

A. Yes, I have examined it.

Q. And checked it?

A. Yes, sir.

Q. I see this statement of account here, which commences November 8 and finishes December 15, is that the one you checked?

A. This is the first bill that was presented, all of our first invoices, sir. This is the first statement that they (289) received.

Q. That you sent?

A. Yes. They were sent all of our first invoices.

Q. You said something in your testimony already about checking this first statement, or checking any statement. Is this the one that you checked?

A. That is the statement that George Gilbertson and Mr. Lane checked.

Q. There is a notation there once or twice, maybe oftener, "checked Geo." Do you know whether that notation on that first bill was put on there by your firm or Gilbertson's firm?

A. It wasn't put on by our firm, sir.

Q. Would you say it was a correct statement?

A. No. No, sir, I wouldn't. That is where the errors were, in that first bill.

Q. Well, do you know, of your own knowledge, when you commenced to work on this project for the Gilbertsons? What date was it, if you know?

A. The only way I have is of checking back, sir. I could check back on the time cards.

Q. Sir?

A. The only way I could tell you would be from my time cards. I could tell you in a minute. It is too long ago to remember the exact date.

Q. Do you know when you quit?

A. We had a small job out there, and it wasn't carried on in consecutive days, so far as my work was done.

Q. Now, I call your special attention to the original bill that you say was tendered and contained errors to the fact that it shows that the last entry apparently made by you against Gilbertson is dated December 15th. Do you know whether that is true or false?

A. No. There was work performed after the 15th.

Q. There was. What was the character of it?

A. I think that was a matter of some——

Q. Sir?

A. I think that was a matter of a range hood.

Q. Range hood?

A. In the kitchen upstairs.

Q. The bill shows there was a range hood, doesn't it? (290)

A. That is true, sir. That was the order for the range hood that was made out on that invoice. The work was never completed until late in December.

Q. Here is an invoice for the installation of the range hood, and it gives the date it was finished. It started 11/3 and finishes 12/13.

A. Which bill are you looking at, sir?

Q. I am looking at this one that says, "Installation of range hood," dated January 8, 1945. It is attached to this general bunch of statements here.

The Witness. May I ask a question, your Honor?

The Court. Surely.

The Witness. Were these time cards entered as an exhibit or not?

The Court. They were marked as an identification. You may refer to them.

A. In refreshing my recollection, I would like to correct my statement about the range hood. It wasn't a range hood. It was making floor flanges for the dance hall, rails in the dance hall.

Q. Rails?

A. Yes, sir.

Q. Where does that show on this original bill?

A. They don't have all of them there.

Q. They don't have all of them?

A. No, sir.

Q. Well, what is overlooked?

A. Do you have an invoice 350, number 350?

Q. Wait a minute. There don't seem to be any numbers on here.

A. On the top, sir, in the left-hand corner.

Q. Yes, I got 350.

A. Do you have one for railing?

Q. Railing, did you say?

A. Yes. It would be for railing; it only shows material, but that is what it was made up for.

Q. Will you look there and see if you find it on there? There is 350, isn't it?

A. Yes. Right here, sir—this material here. However, the date of the time card is later than that. (291)

Q. What did you furnish—what I am trying to get at is what did you furnish or do after the date of December 15th or 16th?

A. It is right there.

Q. It doesn't show that.

A. It does, sir. It shows labor, and it shows also material.

Q. But you were talking about railing.

A. This material was made up into a rail, and that is where the labor was entailed in it.

Q. Anyway, it was all concluded on December 15th, presumably, from this bill.

A. That is right, presumably from that bill, but the time cards were later than that. The work was done later than that.

Q. Do you have the time card?

A. There is one right there on the 20th.

Q. Was there anything after the 20th?

A. I think there is work on the burner after the 20th. There is one on the 24th.

Q. "Service call on burner labor, one hour." You mean they called up and said there was something wrong with the burner?

A. Yes, sir.

Q. You sent a man out there and fixed it, and that is charged up as a part of this contract?

A. That is part of the bills, sir.

Q. Well, do you know anything about what arrangement was made between your firm and Gilbertsons, the defendants, with reference to this contract?

A. We never had a contract, only a verbal agreement with them.

Q. Just a verbal agreement. Didn't you have a cost-plus contract, or some kind of a contract?

A. I don't recall ever having that. They just wanted us to do the work. Under ordinary circumstances, we do that work under time and material.

Q. Didn't you say at one time it was a cost-plus contract?

A. No, sir. We don't operate on a cost-plus basis. (292)

Q. You don't operate on a cost-plus basis?

A. No, sir.

Q. Whatever contract you had with the Gilbertsons in connection with the installation of this heating plant on the Ranch, did it naturally follow that you could charge up to it this call on December 24th as part of the contract?

A. Oh, yes, sir.

Q. You are certain about that?

A. Yes. Any time you get an order through your office, through our office over there, we make a service charge from the shop, which is allowable to us and that is charged from the time we leave the shop until we get back.

Q. Well, would you call it part of the original contract that was entered into to install that plant?

A. We never had a contract. All we had was a time and material job.

Q. Time and material job. So anything that shows up here in the papers, on the pleadings here, that you did have a contract is the bunk?

A. Well, if there is a written contract on it, I never saw it.

Q. You don't mean a written contract necessarily, do you? Any kind of an oral contract would be just as good as a written contract, wouldn't it?

A. We never had an oral contract so far as a set price is concerned. We did have an agreement with the man to do it on a time and material basis. That is an oral agreement.

Q. Wouldn't you call that a contract?

Mr. Bell. I object to that as argumentative.

The Court. I think he is entitled to find out what the witness means by a contract as claimed by his testimony.

A. I would say it is what we could call an order.

Q. An order?

A. An order placed with us to do a certain amount of work, there was not being any question asked as to what the cost will be. To define it, our shop operates

—the way we do business over there, if we have a contract, we specify what we (293) will furnish; ordinarily the amount of time it will take for a certain amount of money to be paid a certain way. If we don't have that written agreement, we have an oral agreement that the cost will not exceed so much. If we don't have that, our work is all charged out on a time and material basis, and I don't really believe it constitutes a contract so far as the plumbing shop is concerned, because he could have stopped or terminated that contract any time he saw fit. It doesn't hinder him from doing as much work as he wants to do on it. Therefore, the responsibility as to the workmanship is ours, but the amount of work is his.

Q. Well, you are prepared to say, now, that you didn't have any contract?

Mr. Bell. I object to that. It is argumentative. He has explained exactly how he was employed, and that is for the court to determine. That is a legal question.

The Court. The objection will be overruled.

Mr. Bell. Exception.

Q. Is that your contention?

A. What was the question again, sir?

Q. I said, your contention is—I don't know exactly what the question was, but I will just revamp it and reframe it. Your contention is that you didn't have any contract. Is that right or wrong?

A. I would say that we had an order, what we could classify as an order, from the Gilbertson brothers to do a certain amount of work. There was no written contract, no.

Q. I call your attention to paragraph four of the amended complaint in this case, which apparently you signed on the 9th day of May, 1945, as follows: "Plaintiffs—that is you—further alleges that on or about the 7th day of November, 1944, the defendants George Gilbertson and Harvey Gilbertson, joint owners and partners doing business at the Ranch, employed these plaintiffs to do certain plumbing, steam fitting and sheet metal work and to furnish certain materials to be used in the buildings and improvements situated upon the hereinafter described premises and property which improvements were then being constructed, remodeled and repaired (294), and the defendants George Gilbertson and Harvey Gilbertson orally agreed to pay therefor, the customary and reasonable price for the material furnished and the labor furnished and performed. At the special instance and request of the two last named defendants, the plaintiffs did and furnished certain work and labor and certain material in the installation and finishing of the improvements and building on said property and that continuously from the commencement of said work and week by week and month by month, these plaintiffs expended and furnished labor, skill and material which were incorporated in the buildings, improvements, and structures on the above-described real estate; that all of said labor, skill, and materials were incorporated in said structures." Do you want to see this before you answer the question? I am reading you what was set forth here in the amended complaint, signed by you on the date I mentioned. Would you like to see it?

A. No, that is all right, if you read it.

Q. I just did.

A. That is right, sir.

Q. With some labor on my part. Now having your memory refreshed by the reading of this statement in the complaint, it is your statement now that there is, or was not, any contract between you and the defendants with reference to this work?

Mr. Bell. I object to that as having been asked and answered.

The Court. Objection sustained.

Mr. Clegg. That is all, Mr. Reed.

Mr. Bell. That is all.

The Court then recessed and after lunch Mr. Reed was recalled and testified that "When we talked about the bill there was no objection made to the plumbing at that time and he said 'We will skip that, because it is all right. There are only a few hours on it.'" And on recross examination the following questions were asked by Mr. Clegg, and answered by the witness. (295)

Q. What plumbing are you referring to?

A. The plumbing we did at the Ranch.

Q. All the plumbing?

A. Yes.

Q. Including this railing you said you put around the floor, or segregated the dancing space from some other part of the building? Is that plumbing work?

A. Well, it could either be done by a pipe fitter, steamfitter, or plumber—anybody familiar with stock and dies could do that work.

Warren A. Taylor was then called as a witness and testified that he was a regular licensed lawyer for the Territory of Alaska, practicing at the bar. Was familiar with the reasonable and customary charges for attorneys in handling cases before this Court and fixed as a reasonable fee, as ten to fifteen percent or $100.00 plus ten percent of the amount involved.

Then George Gilbertson was called to testify on behalf of the plaintiff and testified as to the ownership of the property involved which is set forth at 46, 47, and 48 of the transcript of testimony and proceedings prepared by the Court reporter and filed herein and made a part of the Court clerk's certified transcript. Then the plaintiff rested and the following proceedings took place:

Mr. Clegg. If the Court please, at this time, on behalf of the defendants and each of them, we move for a nonsuit, this action being what is ordinarily called an action for the foreclosure of a lien and is based entirely upon the lien that has been introduced in evidence and testified to by certain witnesses and which has been received in evidence. We ask for (296) the nonsuit upon the ground of failure of proof, it having been alleged in the complaint that the last work and/or materials furnished by the plaintiffs was furnished on the 24th day of December, 1944, and the evidence of the plaintiffs having shown conclusively that the work terminated and the furnishing of materials terminated on the 15th or 16th day of December, and the lien notice introduced in evidence

shows that it was not filed or recorded in the office of the recorder of the Fairbanks precinct until the 21st day of March, which was several days beyond and above the prescribed time of ninety days following the termination of the furnishing of the labor and the furnishing of materials, and, therefore, the filing of the lien at that particular time is a void act on the part of the plaintiffs and was outside of the scope of the law governing the foreclosure and fastening of liens upon real property as established by the law of Alaska. Therefore, no foreclosure can be predicated upon the lien itself, as it is clearly outside the time limit given by the law for the filing and recording of liens.

Mr. Bell. Your Honor, he admits that the last material was furnished specifically in his pleading on the 23rd day of December in paragraph 2. In paragraph two of his answer he admits that it was that day, and the evidence shows that there was material furnished on the 23rd and the 24th both. Mr. Reed showed some little thing on the 24th even, but the 23rd was the last matter that was stressed except some small matter on the 24th, but he admits it was furnished on the 23rd, and that, of course, puts it within the period.

Mr. Clegg. If your Honor please, I would like to add a few words in explanation of that and in contradiction of it. It is true, as Mr. Bell states, that the plaintiffs, having alleged that the work ceased on the 24th of December, we admit it. We admit it clearly

under the mistake and misapprehension and misinformation with reference to the proof. Now they put a witness (297) upon the stand here, and he introduces the absolute records kept by the plaintiffs in this case which shows conclusively and the testimony of the witness, in addition, shows conclusively that there was a hiatus between the 15th and 16th of December, up until the 23rd or 24th day of December, which can't be shown except by their own records, and we assumed, of course, that when a matter of that kind is placed in a pleading that it states the truth. Therefore, without wishing to call for an explanation of the books, or showing of the books of the plaintiffs, the defendants erroneously admit the allegation in the complaint, that the work terminated and the materials caused to be furnished to this property on the 23rd of December; but we have now, your Honor, the exact testimony of the people who were supposed to know and who have kept a record of it, and by their own testimony and by their records, they show that at the time this alleged lien was filed that it was outlawed, and we certainly are not to be prohibited by insisting upon a substantial matter of that kind by an erroneous admission. It is clearly erroneous. It isn't the truth, and that is what we are here for—to ascertain what the truth is, so we ask the Court to allow us to amend the answer, if necessary, in that regard, and, instead of admitting that the work ceased, let us stand upon the proposition shown by their own evidence here that the work had ceased long prior to the

actual time and legal time fixed by the statute for filing of this lien.

The Court. You wish to amend that part of your answer, do you?

Mr. Clegg. Yes, sir, and show that we deny that it was filed on the 23rd or the 24th and insert in place of it the date shown by their own records—that it ended and terminated on the 16th of December instead of the 23rd or the 24th, whichever the pleadings show.

Mr. Bell. I object to the amendment.

The Court. It may be amended to *conform to the evidence,* (298) exception allowed plaintiff. (Italics ours.)

Mr. Bell. Your Honor, the evidence—I want to call your attention to that—the tickets show that work was done on the 24th and he testified to it.

Mr. Clegg. Your Honor, he said he got a service call by telephone to come out there and look at it, and they went out there and charged for one hour's time. That had nothing to do with the original agreement, nothing whatever.

Mr. Bell. He went out there and did the work on the 24th. He went out and fixed something that wasn't working.

The Court. That would be just a repair job. That wouldn't be part of the original contract.

Mr. Bell. The other was within the time. The 23rd is within the time, the material and work furnished on the 23rd.

The Court. The only other, as I recall it, was something on the 20th, the 16th, and the 20th is the very last.

Mr. Bell. Just wait a minute. Let me look at those cards as to dates—Here is one for the 27th.

The Court. There was no evidence about it.

Mr. Bell. I offered this, though, in evidence.

The Court. It doesn't make any difference, though, it wasn't received.

Mr. Bell. Now, Your Honor, may I reopen my case just to offer these particular cards?

The Court. I will permit you to reopen your case.

Thereupon Joseph Lane was recalled and testified as follows:

Q. I hand you a ticket, which seems to be an invoice marked plaintiffs' Identification No. 1 in this case, and I will ask you to state if you know who made the call or did the work on that?

A. I did the work.

Mr. Clegg. Just a minute. We object to this, your Honor, as supplementary to the *prima facie* case made by the plaintiffs and serves to contradict their own testimony and is (299) not permissible as rebuttal evidence, because there is no foundation laid for it, and otherwise it is irrelevant, incompetent, and immaterial.

The Court. No foundation has been laid for the use of any such memorandum yet, exception allowed plaintiffs.

Q. Well, is this an original, a part of the original records in your office?

A. Yes.

Q. Is that a part of the bookkeeping, general bookkeeping system of your office?

A. Yes.

Q. Now, when and under what circumstances are cards like that made?

A. They are made by the man, whoever did the work, at the time the work was done.

Q. And who did the work on the date indicated at the top of this time card?

A. I did it.

Q. Did you date it?

A. Yes, I dated it.

Q. Is it in your handwriting?

A. Yes.

Q. Now, then, did you at that time go upon the premises of the defendant at the ranch and do work there?

A. Yes.

Mr. Bell. Now, I offer this in evidence.

Mr. Clegg. Just a minute, your Honor. Well, that is the same thing that was introduced here by Mr. Reed: call on burner, labor, one hour, service; it says "service", and it is dated 12/24/44. That is the very identical thing Mr. Reed was talking about. We ask that it be excluded, your Honor, and disregarded entirely on the ground that it is incompetent, irrelevant and immaterial and has already been testified to by

a witness on direct examination, by Mr. Reed by direct examination and cross-examination.

The Court. Objection sustained, exception allowed plaintiff.

Q. Mr. Lane, what was the occasion for your going out to the ranch on the 24th day of December, 1944?

A. I was called out (300) there because they were having trouble with the oil burner.

Q. Is that the oil burner you had put in?

A. That's right.

Q. Was that a part of the regular contract work that you had done for them?

A. Well, ordinarily a service call, a service charge, wouldn't have been made there, but, due to the fact that they had taken that burner out themselves and worked on it themselves a few times, we made a service charge on that account, *and it was part of the original work.* (Italics ours.)

Q. And did you do the work after you got out there?

A. I did, yes.

Q. Have you ever been paid for this work?

A. No.

Q. *And this is included in the work that you and George Gilbertson talked over at the time you were going over those tickets?*

A. *That's right.* (Italics ours.)

Mr. Clegg. We object to that as irrelevent and immaterial.

The Court. Objection sustained, exception allowed plaintiffs.

Q. Was this ticket present when you and Mr. Gilbertson, George Gilbertson, were going over the charges and the dispute between you as to the charges and the labor done out there?

A. Yes, it was there with the other time cards.

Q. Was it one of the cards that was agreed upon by you and Mr. Gilbertson at that time?

Mr. Clegg. I object to that as incompetent, irrelevant, and immaterial, not proper direct examination at this time, and it is outside of the issues.

The Court. I think it is also incompetent. I will sustain the objection, exception allowed plaintiff.

Q. You did the work on the 24th day of December, 1944, for the defendants in this case?

A. Yes.

Q. And that was the occasion for making this particular charge?

A. Yes. (301)

Mr. Bell. We reoffer the card in evidence.

Mr. Clegg. We object to it on all the grounds already stated, your Honor, and that it is not proper rebuttal evidence and that there is no foundation laid for its introduction. It has already been testified to by one of the witnesses on the case in chief. It is incompetent, irrelevant and immaterial.

The Court. Objection sustained, exception allowed plaintiff.

Mr. Bell. Your Honor, may I say this, please: It is not rebuttal evidence. You allowed me to reopen my

case in chief, and this is evidence after you have permitted an amendment in the answer.

The Court. I am not ruling on it on the ground that is rebuttal. I ruled on it on the other grounds.

Q. *Was that work done under the same terms and the same circumstances as all the rest of the work done out there?*

A. *Yes.* (Italics ours.)

Mr. Bell. That is all.

Then on cross-examination Mr. Lane testified as follows:

Q. It was done just about as well as the rest of the work was, too, I suppose?

A. Are you competent to judge?

Q. I am asking you that question and I ask you to answer it.

A. I didn't hear a question. I heard a statement.

Q. Will the reporter please read the question?

(The following question was read by the reporter: It was done just about as well as the rest of the work was, too, I suppose?)

Q. You didn't understand that to be a question?

A. No, I didn't.

Q. You thought I was just talking to hear myself talk, is that it?

Mr. Bell. I object to that as argumentative.

The Court. Objection sustained.

Q. What did you do now—Explain to the Court now what you did in connection with this transaction.

A. I fixed an electrode in there. (302)

Q. How did you fix it?

A. I fastened it back up; taped it back in there.

Q. Taped it back in?

A. That's right.

Q. And that was a week after you had been out there before?

A. Approximately.

Q. Approximately?

A. Yes.

Q. What?

A. Approximately, yes.

Q. And you wrote down, you said, this memorandum on this time card? Did you say that?

A. Yes, I wrote it.

Q. You wrote the word "service" on there, did you?

A. That's right.

Mr. Clegg. That's all.

The following proceedings were then had:

Mr. Bell. Your Honor, I reoffer in evidence, now, all of the tickets, the original time cards, that I have offered before a time or two, on the identification that they have had now.

Mr. Clegg. We renew and ask the privilege of renewing our objections to this offer as it was originally made and originally objected to, and upon the further ground that the main case of the plaintiffs is closed, and the offer now comes too late.

The Court. Objection sustained.

Mr. Bell. Exception. That is all.

The Court. I will overrule the motion for a nonsuit for this reason: that although I believe the evi-

dence failed to prove a lienable claim, they nevertheless would be entitled to a money judgment, even though the lien failed, so that is the ground I will overrule it on.

Then George Gilbertson, one of the defendants, was called and testified in defense. "That he is in the hotel business now" and had lived in the vicinity about 11 years, became acquainted with plaintiffs about the time he hired them to put the plumbing and heating in.

That Mr. Walker brought Mr. Lane out there and introduced him as a plumber and steam fitter. We had the job and wanted to get it done so we hired Lane and Reed, they agreed to put the job in. We had a boiler out there and some radiators and fittings that we had bought down at a place that had burned up. That Mr. Lane told us that the boiler was not big enough but that he had one he would sell us: "So Harvey and I go down and look at it with him. He wanted $175.00 for it, but when we come to pay for it, why it was charged up as $500.00." This conversation was with Lane. I told him we wanted a heating plant, we wanted a good plant in there. A plant that would keep it warm. It was suggested that a hot water system be used to start with. Mr. Lane claimed—electric unit heaters "That steam or water, whatever you are using, goes through the fans, through the tubes and the fans only—he claimed a hot water system wouldn't work in those unit heaters. So we put steam in there and we got the steam plant sitting out there now. It don't work. It couldn't keep the

place warm. It was put in by Lane and Reed. They put a new oil burner in to start with. He was supposed to put in an outfit that would work. It didn't work. We paid part of it at the time and a little here and a little there when they needed some money.

Then this question was asked:

Q. Well, on what basis was he to be paid?

A. Well, there was nothing stated about that. (Page 60 of Transcript.)

Q. There was nothing stated?

A. Nothing.

Q. Was it a cost-plus basis?

A. Well, I heard Mr. Lane say that this morning. That is the first I knew of it.

Q. What did you understand it was?

A. I understood there was a heating plant to be put in there. So far as I know, when it was through and finished, and if it was a good job, I would pay for it.

They put the boiler in there. It took about six weeks to. (304) Some men came out there and worked for a short time and go back to town. We had four or five carpenters working out there; they had us tied up all the way through. It was in December when they got the plant working. I could not tell you the date. It never did heat the place. They had an oil burner in there. From what we understood, it was too small. They took it out and put another one in there. I know they had calls on it to go out and repair it but they never did repair it. Harvey bought another outfit from Wilbur's and put another heater in there, or

oil burner. (Page 62 of Transcript.) Lane and Reed had two of them. They put a new one in to start with and it run steadily; it didn't cut off so they put this old one in, an old worn out one. Apparently the pump didn't work, and it would explode. It sooted the whole place out there so then Harvey called up Wilbur's. He called Lane and Reed. They were out I guess, a time or two. Mr. Reed was out—as a matter of fact, I believe he came down to the hotel to see me and we went out to the ranch. I believe it was January, to see if they couldn't make a settlement. Mr. Reed said he would go in and see his partner; that he would rather do that than go to Court. The next day he slapped us with the lien. He never did come back after that. It never worked properly.

These questions were asked and these answers given:

Q. The question is, George, do you know of your own personal knowledge what was the condition of this heating plant at that time?

A. Well, it was unsatisfactory.

Mr. Bell. I move to strike that.

Q. Answer "yes" or "no". Do you know, or don't you know?

A. Yes, I do know.

Q. All right. Tell the Court now, what condition it was in.

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial, and he has not been shown to be qualified to answer. (305)

A. Well, this oil——

The Court. Just a minute. I don't know just what time you are referring to, Judge Clegg.

Mr. Clegg. The time that he said that they called up Wilbur, at that particular time, because the plant was not working satisfactorily. Now, what time was that?

The Court. Has he shown that a different one was put in?

Mr. Clegg. Yes, he answered that question.

Mr. Bell. Your Honor, I believe Mr. Clegg is wrong. I objected to that question, and you sustained it.

The Court. I don't think there has been any testimony that this witness knows when it was that his brother did call up Wilbur—that he knows of his own personal knowledge.

Q. Do you have any idea when that was?

A. I have no idea. I couldn't say.

Q. Was it before Christmas, or after Christmas?

Mr. Bell. I object to that. He has already answered that he doesn't know.

The Court. Objection overruled.

Mr. Bell. Exception.

A. I wouldn't say.

Q. You wouldn't say. Well, when was it that you found out that it wasn't working correctly and properly?

Mr. Bell. I object to that as assuming a fact that is not in issue.

The Court. Objection overruled.

Mr. Bell. Exception.

Q. Can you state about what time?

A. The date they put steam in the boiler.

Q. The date they put steam in the boiler. Well, they afterwards transformed it into an oil burner, did they?

A. It was an oil burner then.

Q. Huh?

A. It was an oil burner then.

Q. An oil burner then. What we want to find out, now, George, is what you know about the defects, the unsatisfactory condition, of this heating plant to do the work it was supposed to do. What was wrong with it to your own knowledge?

A. It wouldn't put out the heat for that building out there. It sooted the whole place up—stairs, downstairs—and all through.

Q. How long did that continue?

A. Until Wilbur put the new oil burner in there.

Q. Did you furnish the oil burner, or did Reed and Lane furnish it, or did Wilbur furnish it?

A. The last one that went in there, Wilbur put in there.

Q. How is that?

A. Wilbur put the last one in.

Q. Did you furnish it?

A. Harvey did. He bought it from Wilbur's.

Q. But Reed and Lane didn't furnish it?

A. No, they didn't.

Q. Well, did that, or did it not, correct the defects in the previous oil burner?

A. It kept the soot down.

Q. It kept the soot down?

A. It didn't soot the place up any more.

Q. Is that the one that is in there now to your knowledge?

A. That oil burner is in that boiler right now, in another boiler.

Q. In another boiler?

A. Yes.

Q. Who furnished that other boiler?

Mr. Bell. I object to that as incompetent, irrelevant and immaterial and not within the issues in the case.

The Court. Objection overruled.

Mr. Bell. Exception.

A. Through the Wilson and Wilcox plumbing concern here in town. (307)

Q. What did they have to do with fixing the heating plant, if anything?

A. They changed the whole works around, put in new fittings and a new boiler.

Q. Is that the outfit that is in there now, the heating outfit?

A. That is the one that is in there at the present time.

Q. What did you say their names are?

A. Wilcox and Wilson.

Q. Wilcox and Wilson?

A. I think that is their names.

Q. Huh?

A. I am quite sure that is their names—yes—Tommy Wilson and Whitey Wilcox; I don't know his first name.

Q. Now, just describe it, if you will, what was the character of the damage to the building caused by these previous burners?

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial and not within the issues here.

The Court. I think that is without the issues, isn't it? You didn't ask for special damages.

Mr. Clegg. We don't ask for any special damages, but I wanted to inform the Court as to the character of the damage, or destruction, which those burners caused to the interior of the building, being the burners that were installed by the plaintiffs in the action, just generally. I don't want to go into the details of it, but I would like to show that it was something more than a mere temporary and trivial destruction, item of destruction.

The Court. Very well, I will permit to you to show it.

Mr. Bell. Exception.

Q. Just generally speaking.

A. I understand it cost about $1000.00 out there to wash the walls.

Mr. Bell. I move to strike what he understands.

The Court. Motion granted. (308)

Q. Just describe what sort of condition it was in.

A. Everything was all sooted up; it was all sooted up.

Q. What do you mean by "everything"?

A. The building, the curtains, and the clothing they had up there in the rooms, tablecloths and all linen; the whole building, in fact.

Q. What kind of linens did you have?

A. Well, it was sort of a linen for the tablecloths; curtains, and their clothing.

Q. Before this occurred, what was the condition of the interior of the building?

A. It was all new.

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial, and not within the issues presented.

The Court. Objection overruled.

Mr. Bell. Exception.

A. The building was all new, all varnished.

Q. What did you have to do to get rid of the soot, if anything?

Mr. Bell. I object to it for the same reason.

The Witness. We had to wash the whole interior of the building.

Mr. Bell. And now I move that the answer be stricken. It was given before the Court had an opportunity to rule on the objection.

The Court. The motion will be denied.

Mr. Bell. Exception.

Q. You wait a minute before you answer to give Mr. Bell a proper and full opportunity to make objections and don't answer then before the Court rules on them, so we will get along smoother and better all around. You said you had to wash the walls, or something, did you not?

A. Well, yes, they had to wash the walls.

Q. What sort of a job was that? (309)

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial and not within the issues.

The Court. The objection will be sustained.

Q. Well, did you have to employ any help to do that?

A. I believe we had about three men out there working.

Mr. Bell. I move to strike that. He said he believes.

The Court. Motion sustained.

Q. Do you know whether you did or not?

A. I know we had them working at washing the walls.

Q. How many people?

Mr. Bell. I object to that unless he knows how many people or who they were.

The Court. I will sustain the objection.

Q. Do you know who they were?

A. No, I don't know. I know the one man was Mr. ....., and he had a couple of native women out there the day I was out there. The one day I was out there there were three. How many we had altogether, I couldn't tell you.

Q. Now in order to clean the place up, was it much of a job?

A. Well, yes. It is a—it is a pretty big job.

Q. How much did it cost you?

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial and not within the issues.

The Witness. It didn't cost me anything. Harvey paid for it.

The Court. Objection sustained.

Mr. Bell. I move the answer be stricken.

The Court. It may be stricken.

That Reed and Lane billed out the boiler at $500.00, and afterwards changed it to $175.00 as previously agreed upon. "My brother and I went down to Reed and Lane Plumbing (310) Shop and asked him about this $500.00 for the boiler" and "Mr. Lane denied that he agreed to let us have it for $175.00 so Harvey proceeds to tell him, he wants to know if he went insane, if he couldn't remember the deal we made.

"I never agreed to the correction of the bill; they were going to revise the bills which they did, and they came out more than they were originally. We never did accept the job as finished. We were dealing back and forth, they wanted to force us to the issue on it, and we wouldn't settle with them until they put the heating plant in shape and they never did. Mr. Reed said, 'I will grant you took an awful beating here. I will see if we can get you a new oil burner.' That was in January or February some time."

Q. Can you briefly itemize the defects in this heating plant as it was left by Reed and Lane?

A. Its defects?

Q. Yes.

A. We had oil burner trouble all of the time.

Q. What about the pump?

A. Well, there was no pump. The pump on the oil burner wasn't working. I guess it is worn out. The oil burner man tells us——

Mr. Bell. I move that be stricken, what somebody else told him.

The Court. It may be stricken.

Q. If there is anything you can state about it within your knowledge, I would like you to inform the Court.

A. Well, it had blown the doors off the boiler.

Q. It had blown the doors off the boiler?

A. A number of times.

Q. Huh?

A. A number of times.

Q. A number of times. What did you do with reference to repairing it?

A. Well, that Montgomery was in charge of the day shift there, my clean-up man, and he would call (311) up later in the week——

Mr. Bell. I object to him testifying about a conference, about somebody by the name of Montgomery.

The Court. Objection sustained.

Q. Do you know what we are talking about here, of your own knowledge?

A. Yes, I do.

Q. Well, did they do anything about repairing it?

A. Well, they worked on it, but never repaired it.

Q. They worked on it, but never repaired it. Now, where is this boiler you are talking about now?

A. It is sitting out there by the side of the building.

Q. Did you, or your brother, to your knowledge, notify Reed and Lane about it?

A. I understand Harvey went down and told them to come down and take the boiler.

Mr. Bell. I move to strike what he understood.

The Court. It may be stricken.

Q. Did you do anything personally?

A. I never did nothing in regards to that, no.

Q. Well, Harvey is right here?

A. Yes.

Q. The burner as well as the boiler is outside?

A. *They are both sitting inside.* (Italics ours.)

Q. They never came after them?

A. They never did.

Q. So far as you know?

A. They hadn't up 'till last night.

Mr. Clegg. That is all.

Mr. Bell. I move to strike all of his testimony about the boiler not working, the burner not working, and the sooting of the place, for the reason that it is outside of the issues, and there is no dispute, there is no contention that it was a contract to do anything except furnish some labor and material; and this is not defensive matter, because if they had made a contract to do some particular thing for a certain amount, it would be an implied warranty that it (312) would work, but there is no testimony of any implied warranty, and I move to strike that part of the answers.

The Court. Motion denied.

Mr. Bell. Exception.

And on cross-examination he testified as follows:

Q. Mr. Gilbertson, you say you went with Harvey to see this boiler before you put it in out there?

A. Yes, I did.

Q. Where did you go to see it?

A. It was laying down by Lane and Reed's plumbing shop.

Q. Now what was the occasion for going there to see this boiler?

A. Because Mr. Lane told us to come down and look at it.

Q. Did he tell you it was an old one?

A. He did. We could see that.

Q. It showed its age there, didn't it?

A. Well, I don't know nothing about how old it is.

Q. You are a steam fitter, aren't you?

A. I was about fifteen years ago.

Q. You were in good standing as a steam fitter?

A. Yes.

Q. Now, when you saw this boiler, he offered it to you for $175.00, didn't he?

A. He did.

Q. What would a boiler like that new be worth up here in Fairbanks at that time?

A. At this time of the year?

Q. No, at that time you were talking to them, that they were talking to you, down there?

A. I couldn't tell you.

Q. It would be worth a couple of thousand dollars, wouldn't it?

A. No, absolutely not.

Q. Well, what would it be worth, in your opinion?

A. I don't know.

Q. It would be worth a great deal more than $175.00 (313), wouldn't it?

A. If it was new, perhaps it would.

Q. Now, did he tell you at that time that this was a second-hand boiler and where he had gotten it?

A. I understood it come out of the Star Airlines hangar.

Q. Now, it was pretty near impossible at that time, Mr. Gilbertson, to get new equipment here in Fairbanks, wasn't it?

A. We had a boiler out there to put in, and Mr. Lane said it wasn't big enough.

Q. Answer my question. It was pretty near impossible to get a new boiler here at that time, wasn't it?

A. *I imagine it was.* (Italics ours.)

Q. And it was pretty hard to get any equipment at that time?

A. You could get any equipment you wanted.

Q. You could?

A. I could.

Q. Why did you buy this second-hand boiler then?

A. I believe you answered that.

Q. You couldn't get a new one, could you?

A. I didn't try to.

Q. You never tried. Now, these oil burners, at the time, they were pretty scarce at that time?

A. No, I believe there was some in town.

Q. Some in town. Now, he first put in a small burner that was a brand new one, didn't he?

A. That's right.

Q. And he told you when he put that in it was pretty small, but he thought it would work all right, didn't he?

A. I don't recall that.

Q. He charged you at that time for the new burner, didn't he?

A. I paid him for it right there.

Q. How much did you pay him for it?

A. I gave him a check; I believe it was $250.00.

Q. And you were later given credit for the $250.00 on the statement of account between you people, weren't you?

A. Well, there is some difficulty on them statements there. (314)

Q. Do you have the check with you?

A. I haven't got it with me, no.

Q. The sum was for $250.00, wasn't it?

A. I believe it was. I believe it was. I am not certain.

Q. Mr. Gilbertson, you saw a paper, a statement, like this only it was white. I believe the statement, the original copy, that they had out at the place was white, was it not?

A. I believe so, yes.

Q. Now, turn over the second page. You notice a credit for $250.00 on 11/25/44.

A. Approximately there.

Q. Yes, that is approximately the date. 11/25/44 is the approximate date—for $250.00. Now, that is the $250.00 you are talking about paying, isn't it?

A. Like I said, I am not sure what the check was. I said I believe it was about that.

Q. Now, Mr. Gilbertson, your experience as a steamfitter over the years that you were a steamfitter, had taught you something about what would equip your building, hadn't it? You knew pretty well what would equip it?

Mr. Clegg. I object to that as irrelevant and immaterial. It is a proposition, your honor, where these parties are claiming something for the work, experience, and materials that they furnished and what Mr. Gilbertson, the witness now before the Court, knew about it fifteen years ago at some unknown place is wholly immaterial and irrelevant.

The Court. Objection overruled.

Q. *The years that you worked as a steamfitter had naturally qualified you to know pretty well what it would take to properly heat your building, hadn't it?*

A. *Well, I should know a little bit about it.* (Italics ours.)

Q. Now, you saw that boiler before you bought it, hadn't you?

A. Yes, I did.

Q. And you saw the burner before it was put in, didn't you?

A. I didn't see it until it was laid out there. I saw it in a box. It was the only time (315) I saw it.

Q. How long was it out to your place before it was put in?

A. Well, it was sitting there quite a few days.

Q. It set there all of the time they were setting the boiler, didn't it?

A. No.

Q. Well, how many days?

A. Oh, it was perhaps, say, a week or ten days before it got put in.

Q. Now, do you remember a conversation between you and Mr. Lane about this burner before it was put in?

A. Such as what?

Q. Well, did you have a conversatiton with Mr. Lane about this new burner?

A. All I know is we bought the burner.

Q. Didn't you talk about the burner any?

A. Not that I recall of.

Q. Now, the, you were to pay him $250.00—or, did you pay him $250.00 for that burner, didn't you?

A. I believe that was what they charged for it.

Q. Now, after it was in there a while, that burner didn't soot anything up, did it?

A. It didn't heat the boiler.

Q. Wasn't your complaint, Mr. Gilbertson, that it had to run too much of the time, or practically all of the time, to keep the boiler hot?

A. Well, it was running practically steadily.

Q. *It did keep the boiler hot when it did run practically steadily, didn't it?*

A. *Well, yes and no.*

Q. *Well, now, did you set a radiator yourself there?*

A. *Yes, I did.* (Italics ours.)

Q. Now, that wasn't set by Mr. Lane, was it?

A. No, it wasn't.

Q. Now, did you have any trouble with the radiator out there not heating, and then have a conversation with Mr. Lane about it?

A. We put the one in first, and then, after the plant was in and working, they put another unit heater in there. I don't know nothing about these unit heaters.

Q. You don't know who put the unit heaters in?

A. Lane (316) and Reed put the unit heaters in.

Q. You say when they revised the bill it was more. You do remember that the reason was that these unit heaters had been shipped up from Seattle to the depot and were taken directly from the depot to your place and used, and that wasn't in the original bills?

A. I don't know whether they were billed there or not.

Q. Will you take that bill and see if you can find those unit heaters in there, please? I am asking you, Mr. Gilbertson, about this itemized statement that you testified was changed. You have it there. Please check it and see if there is any unit heaters charged in that statement?

A. I believe that Mr. Lane and Mr. Reed brought that up and had it charged.

Q. Will you look through there and see if there is any charge to you in that whole bill for the unit heaters?

A. I don't see them on there.

Q. You don't see them on there. I will ask you if on this statement, if they are not on the corrected statement, this bill being, "This cancels and supersedes all previous billings." You do find the two unit heaters in there, don't you?

A. That is not an itemized statement.

Q. Well, they are charged as $97.50 each, $195.00?

A. $195.00.

Q. They were not on that statement?

A. I believe there was something brought up about those. I am not certain what that was.

Q. You and Mr. Lane talked that over, didn't you?

A. I believe it was Mr. Reed.

Q. Now, I notice that you have totaled—is that your figuring on the front: $2382.81? Is that your figures?

A. I wouldn't say, but I could tell you.

Q. You think if you added those three adding machine slips, you would get this $2382.81?

A. I am sure these are——

The Court. Just a minute. Will the witness get on the stand?

A. I am sure them are not my figures. (317)

Q. Now, will you please check the totals on the two and see if the one on your knee isn't twenty-one hundred and some dollars, the total charges out there, twenty-one hundred and some dollars?

A. Yes, but the credits are $667.48.

Q. Then what does the yellow slip show as the balance due, the little yellow slip on your leg?

A. The last?

Q. Yes.

A. According to their figures, it is $1429.76.

Q. Well that is less than the figures that you have on the ticket in your left hand, isn't it?

A. There is no credits on these, you see.

Q. There are no credits on them. Taking the credits off, even that is less; it is about $400.00 less if you consider the unit heaters, isn't it, Mr. Gilbertson?

A. No, I won't say that it is.

Q. Well, twenty-three hundred and some dollars on one and twenty-one hundred on the other, and the last one, twenty-one hundred, has the two unit heaters in it of $195.00, don't it?

A. To tell you the truth about it, the way they have it mixed up, I don't know how anybody would understand it.

Q. Are you a bookkeeper, Mr. Gilbertson?

A. No, I am not.

Q. Do you know where it says "credit" and "charges" and "balance" up at the top there, at the top of the page, where they start off?

A. We have two credits here.

Q. I mean this, starting right there. Now, you have a number of credits under the column for credits, don't you?

A. I see that.

Q. Now then, the balance that that itemized statement shows is fourteen hundred and how much?

A. It says here $1429.76, according to Lane and Reed's figures.

Q. $1429.76. You had a statement like that before you when you and Mr. Lane were in a conference together, didn't you?

A. No. Mr. Reed.

Q. You first had one, you and Mr. Reed, and had these tickets?

A. Mr. Reed, not Mr. Lane, brought this out to the Ranch.

Q. You and Mr. Lane had these tickets before you?

A. No (318) he brought this statement here with him and we checked those.

Q. And you checked those tickets?

A. We checked them.

Q. There were some credits allowed on account of some error, wasn't there?

A. I could see stuff I purchased other places, at Palfy's plumbing shop, Wilbur's plumbing shop, the N. C. Company, and the Sampson Hardware, which Lane and Reed had charged out against us again.

Q. You were given credit for $60.00 that day for the return of some stuff that you had bought from Palfy?

A. Palfy, the N. C. Company, Wilbur and Sampson Hardware.

Q. And that $60.00 was agreed upon between you and Mr. Lane that day?

A. Lane and Reed just took all the fittings out there at that place and took them to town.

Q. How much was that?

A. I don't know.

Q. They took what was out there?

A. They took what was out there, what we had there ourselves.

Q. You and he agreed on an adjustment of $60.00 credit?

A. He said he would allow $60.00. I don't know what he took, but I know he got $60.00 worth.

Q. Did you agree to the $60.00?

A. I did. There was nothing else to do.

Q. All right, sir. Did you ever call Reed and Lane to come out there about anything when they didn't come?

A. Yes, I did. I called them time and time again when they were working on the job, supposedly.

Q. Did you ever call Mr. Lane and talk to Mr. Lane about this heating system not working when he didn't come to see it?

A. No, I didn't myself.

Q. You didn't yourself?

A. My brother was out there. He took care of that.

Q. Now, this burner that is charged at $100.00, and you are credited for $250.00 for the return of the new burner, was the $100.00 burner an old burner?

A. Well, they charged me for two (319) burners.

Q. You are credited with one at $250.00?

A. That one we paid for.

Q. And you are only charged on the ticket there with one burner, aren't you?

A. We are charged out with two, I believe.

Q. No, this ticket that you and Mr. Reed went over, the corrected statement?

A. This is the one he brought out to the Ranch, the copy of this one.

Q. That one charges you with only one burner at $100.00, doesn't it?

A. Yes, that's right, I believe.

Q. And it says, "as agreed". Now, that was a used burner, wasn't it?

A. Yes, it was.

Q. It was an old one, wasn't it?

A. I understand it was.

Q. Now, that was a pretty good sized burner, wasn't it? It was rather large?

A. I don't know anything about oil burners.

Q. But it was larger than the small one you had in it to start with, wasn't it?

A. It looked like it was large.

Q. *When it was working, it heated the boiler adequately didn't it?*

A. *When it did work, yes.* (Italics ours.)

Q. You didn't know that was a second-hand, old burner at the time you had him take the old one out and put a new one in?

A. My brother called them up and had them bring this other burner out there, because the other one would not keep the boiler warm.

Q. Now, when did you leave out there and go to your other busines in town?

A. They took over the 1st of December.

Q. The first day of December, 1944?

A. That's right.

Q. So the work done from then on, what matters that were hauled out there, were handled with Harvey, isn't that right?

A. That's right, sir.

Q. All right, now, he did correct that charge, that original billing of $300.00 for this boiler? He agreed to reduce that to $175.00 on that ticket, didn't he? (320)

Mr. Clegg. I object to that as already having been testified to.

The Court. Objection sustained.

Q. Now, when you hired them to do the work out there, it was—they didn't make a contract to furnish you any particular thing or to do any particular thing? You hired them to go out there and work at so much an hour and furnish certain materials?

A. He had us charged up, to start with, on supervision, and we had that cut off.

Q. Where is that?

A. He had that on his own ticket. He had supervision charged at $3.50 an hour, if I remember right.

Q. Then you did have an agreement with him about supervision, didn't you?

A. There was no agreement. I was dealing with Mr. Lane entirely.

Q. You were dealing with Mr. Lane entirely?

A. That's right.

Q. What did you tell Mr. Lane about supervision?

A. I called him up. He was giving us, just like the Walker Construction Company give us, a little run-

around out there. They agreed to do a job for $1000.00, and we ended up paying $1700.00. I told him, "Don't go pulling a Walker Construction trick on us, because we won't agree to it."

Q. Then did you explain to him what you meant? Did you talk to him about supervision?

A. He tore those cards up; I believe he did, because he never charged us out with it after that.

Q. Mr. Gilbertson, you told him you didn't want to be charged any more with supervision?

A. We didn't feel like paying three and a half an hour for supervision.

Q. Mr. Lane, then, never charged you any more for supervision?

A. Well, he said this morning that he charged his own labor up.

Q. It was just his labor, wasn't it?

A. He charged his labor up, yes.

Q. Now, then, Mr. Gilbertson, you had someone out there keeping time, too, in the matter, did you not?

A. Yes, we did (321) that.

Q. You and Mr. Lane checked those two records against each other?

A. We did that.

Q. And he allowed you nine hours that your account didn't show, and he took off nine hours and gave you a credit for $27.00, didn't he, on that ticket so it would match your charge?

A. He took off $27.00 one place and $28.50 one place and $2.00 another.

Q. Now, then, when he took those off that would leave the tickets, then, credited with the hours that you had, according to your record?

A. It still doesn't correspond.

Q. Well, you had your books and his together when those credits were made, didn't you? These tickets and your tickets were all there, weren't they?

A. He did take his own card. "Well," he said, "I won't run those through on the charge, then." That was $3.50 for supervision; I believe it was three dollars and a half.

Q. He took those off and gave you credit for them, didn't he?

A. There is a $58.00 credit here for his labor, I guess it is.

Q. Well, there is nine hours of labor, $3.00 an hour, for a mechanic, isn't it? Doesn't it show there?

A. Nine hours and one-half one place, and nine hours another place.

Q. Nine hours for a mechanic, at $3.00 an hour, $28.50?

A. Nine and a half hours.

Q. Nine and a half hours?

A. $28.50.

Q. That is a credit to you, isn't it, under the column of credits?

A. There is a $58.00 credit there.

Q. Then there is a $2.50 credit for a helper, one hour for a helper, two and a half?

A. Total, $58.00.

Q. Now, he consented to give you that credit because of the difference in your time-keeping, didn't he?

A. Apparently he did, yes.

Mr. Bell. That is all.

Mr. Clegg. That is all.

Then Harvey Gilbertson was called and testified in his own behalf that he was interested in The Ranch close to Fairbanks; that he knew Reed and Lane; that he had business dealings with them in 1944 from October or November; that they were to put in a heating plant; that he worked at The Ranch all the time; "We had to have a heating plant and we went to them about it; they said they would put one in; they did it, but it never did work. They put in a boiler and an oil burner to heat it and some radiators and pipes. We already had those but some of them I guess they furnished, those that were shipped up here. They were what you would describe as electric unit heaters. I guess they were through, but it was never working when they did get through. I found that out as soon as they started the outfit out because it was supposed to be complete but it wouldn't work.

Then this question was asked (Tr. p. 90):

Q. What was wrong with it briefly?

A. I don't know. I just don't know much about it myself.

Q. You don't know much about it yourself. Well, what effect did it have on the interior of your building, if any?

A. Well, it dirtied it all up.

Q. How much and how badly?

A. Well, I don't know; just soot all over the building, all over our clothes, and all over things in the dining room and everything.

Reed and Lane were informed of the condition, they came out and adjusted it a few times, four or five times, it made it worse I believe; about the same I believe. The first one was a small burner, it didn't heat the place, the second one was larger, it didn't heat it either, and that is the one that caused all the dirt and soot.

Then this question was asked:

Q. How did that dirt and soot originate? What was the cause of that?

A. I really don't know, only when it would shut down and then start up, it would just blow off the doors, or open, rather, and then just a lot of soot would come out all over. (323)

Then the following questions and answers and proceedings were had:

Q. Was your interior perceptibly hurt?

A. Yes.

Mr. Bell. I object to that as incompetent, irrelevant, and immaterial and not within the pleadings.

Q. Just generally speaking.

The Court. Objection overruled.

Mr. Bell. Exception.

Q. Just briefly; don't go into the details.

A. Well, it just dirtied the place all up.

Q. Was it slight or trivial?

A. Very bad.

Q. What?

A. Very bad, yes.

Q. What did it require you to do?

A. Get a lot of help and wash it all down and clean it all up and send the clothes and everything to the laundry and cleaners.

Q. Then after you got that done, did they do anything more to it?

A. No, I didn't do that until after we got that burner out of there, because there was no use. There was nothing we could do. We took some of our things out of there.

Q. What about—did you have to take the burner out, you say?

A. Yes.

Q. Then what?

A. Well, I called them several times to come and fix it, and they never did, and it didn't seem like they could, so I got to work. There was no use; I couldn't keep on going forever, so I called another oil burner man.

Q. Who?

A. Mr. Wilbur, and we had there the fellows who were working for him, and they came out.

Q. What did they do, if anything?

A. They put in a new burner.

Q. A new burner?

A. Yes.

Q. How did it work after that?

A. Well, there wasn't any soot, but it just didn't make the place warm enough.

Q. It wasn't efficient in heating the place?

A. That's (324) right.

Q. What did you do after that?

A. Well, it finally winds up having to have a whole new system put in.

Q. Who did that for you?

A. Wilcox and Tommy Wilson.

Q. About when?

A. This last fall.

Q. Last fall. Do you mean in December?

A. No, earlier than that.

Q. What?

A. Earlier than that.

Q. Earlier than that?

A. Before the cold weather set in.

Q. Before the cold weather. Was that an efficient heating outfit?

Mr. Bell. I object to that as calling for a conclusion of the witness. He has not shown himself competent to testify as to whether it was or wasn't.

The Court. Objection sustained.

Mr. Klegg. He can tell whether he was freezing to death or not.

The Court. Objection sustained.

Q. How did the one work that Wilcox and Wilson put in?

A. It works very good.

Q. Is it there now?

A. Yes, sir.

Q. *What did you do with the old plant, if anything?*

A. *It is still sitting out there.*

Q. *Where?*

A. *Well, in the addition that we built to put it in.* (Italics ours.)

Q. Did you do anything about notifying Reed and Lane about it?

A. Yes.

Q. What?

A. Well on the burner, when we first took that out, I called them a couple of times to come and get it, so they didn't; so then I went to them when I got this other system in and went to the store there and told them to come and get the boiler if they wanted it, so he said, well, he didn't want it.

Q. They didn't want it?

A. Yes. "Well," I says, "It is (325) no use to me. Somebody might be able to use it." "Well," he says, "we will come to take it and give you credit for it." But they never did come.

Q. It is still out there, you mean?

A. Yes.

Q. How much did you pay for that boiler? What did they charge you, I mean?

A. Well, at first it was $175.00 and then $500.00, and then back to $175.00 again.

Q. Did you at any time agree with them as to the amount to be paid for their services?

A. No.

Q. Did you, at any time, accept the work that they did out there as a finished job?

A. No, sir.

Mr. Bell. I object to that as a conclusion. The circumstances would control.

The Court. Objection overruled.

Mr. Bell. Exception.

Mr. Clegg. You claim that in your papers, in your pleadings.

Q. You never did have any agreement to that effect with either of them?

A. No.

Q. Speak a little bit louder, please.

A. No, I never did agree to it that it was finished. I tried to get them to come out and fix it some way, so it would give us some heat.

Q. Was that before you finally had Wilson and Wilcox work on it?

A. Yes.

Q. Who were they? What did they do?

A. Well, after they didn't come, I just had them come out and see what they could do.

Q. Who are they?

A. Well, they are two plumbers that got a shop here. I think they have a shop here. I have never been in it.

Q. Well, they are in the business——

A. Yes sir.

Q. ——of heating?

A. That's right.

Mr. Bell. I object to that. He says they were plumbers. (326)

Q. Do you know anything about what their occupation is, what they do?

A. Well, I guess they put in heating plants—plumbing.

Mr. Bell. I move to strike that he guesses. He says he guesses.

The Court. All right. It may be stricken.

Q. What did they do for you?

A. They put in a heating plant.

Q. A good or bad one?

A. A good one.

Q. That is the same one you are now using?

A. Yes, sir.

Mr. Clegg. That is all.

On cross-examination, Harvey Gilbertson testified as follows:

Q. Mr. Gilbertson, you stated that it was put in in 1944 by Reed and Lane, didn't you?

A. Yes.

Q. And you used that up until the fall of 1945, you say?

A. Well, we did, yes.

Q. Now, Harvey, did this—does this burner that you have in there now, is it the same size as the small burner that you had when Reed and Lane put it in the first time?

A. I really don't know.

Q. Well, does it look about the same to you?

A. I haven't any idea, because it has been gone for quite a while. I never saw the two together.

Q. Now, do you know whether it was you or George, or who was it, had the men change the small burner for the old second-hand burner?

A. Well, I think George was the one who had most of the doings of that.

Q. Well, Harvey, you knew when they put that old burner in there that was a second-hand burner, didn't you?

A. Yes.

Q. And they only charged you $100.00 for it?

A. I believe that's right.

Q. And I believe they told you if you didn't like it they would give you a $100.00 credit?

A. They agreed to put in a (327) new burner as soon as they could get one.

Q. You didn't pay them and you got in a lawsuit, isn't that right?

A. Yes, that's right. We wanted some heat. If they had fixed the heating plant, we would have paid them.

Q. They offered to take the old burner out at any time they could get one big enough—you or they, either one—and they would take it back and give you a full $100.00 credit for it?

A. That's right.

Q. And this fuss came up and you wouldn't pay them?

A. No.

Q. And they got in a lawsuit and filed a lawsuit against you?

A. No, not until they wouldn't come out and do anything about fixing the burner. Everybody else had burners.

Q. You don't know where the burner came from that the other people got, do you?

A. No, I don't.

Q. Now, you did use this one for a year?

A. Well, not quite a year.

Q. Well, you used it from—it was put in out there on October 10th or 12th, wasn't it?

Well, we didn't start using it until December because we were closed down for quite a while while they were putting it in.

Q. Now, this burner you got in out there now is new equipment, a full new outfit, isn't it?

A. Well, it is the same burner that Wilbur put in the old boiler. It is the same burner.

Q. It is a new burner, though, isn't it?

A. It was, yes.

Q. What kind of a boiler do you have out there now?

A. I don't know what you would call it.

Q. Is it any larger than the old one?

A. No, it isn't as large.

Q. It isn't quite as large even, is it?

A. No.

Q. And Mr. Wilbur put that in for you?

A. No, sir.

Q. Who did put that in?

A. The boiler? Wilcox and Tommy Wilson.

Q. Is that a new boiler that is in out there now?

A. I believe it is.

Q. A new burner and new boiler?

A. The burner was used in the old boiler for a while. I bought it from Wilbur.

Q. Do you remember what you paid for the new burner?

A. I believe the burner was—I believe it was $182.00 or $185.00.

Q. Do you know what you paid for the boiler, the new boiler?

A. Well, that was put in with the job, on this job that they did.

Q. What did they charge you for putting that in?

A. The complete job, I believe, was $1255.00, something like that.

Q. Was that boiler approximately $1000.00?

A. No, that included all of the work and everything.

Mr. Bell. That is all.

Mr. Clegg. That is all.

Mr. R. H. Heider was then called to testify for the defendant and was interrogated by Mr. Clegg; he testified that his name was R. H. Heider, was an oil burner mechanic, lived in Slaterville, 407 Minnie, lived in Fairbanks almost three years, worked for the engineers at Ladd Field and for the Alaska Road Commission and for himself, and some work for Wilbur, oil burner work, setting up oil burners. He

knew the plaintiffs in the case, knew the defendants did work for Gilbertsons while he was employed by Wilbur in the latter part of February or the 1st of March, 1945; he put in a new burner in the boiler, cemented it in and run a small amount of cement around the base of the boiler where soot had come out and that was all. The boiler was on a small base he noticed the crack about three-eighths of an inch, or one-half of an inch, he took cement and run it around the boiler to seal that crack up to keep the soot from coming out. He saw the boiler three or four times, possibly a half dozen times. He could not tell whether sealing had been placed originally on the boiler. He shortened the fire box and narrowed it slightly approximately four inches on each face. He felt that in putting in a different burner that he needed a different size fire box so he changed it; (329) made it a little smaller to fit the tip that he had. He took the burner out that was in there, put a new one from Wilbur's in and started it up. (Tr. p. 101.) "I know nothing about the boiler, only the burner. The boiler so far as I know is primarily a coal burning boiler and it was attempted to be transformed into an oil burner. It took me three hours to change it, to change the burner, and then I went back two or three times for a period of ten or fifteen minutes each time just to see how it was working. I was taken upstairs and shown what the condition was all through the house, part of the building, the living quarters and dining room, I went down and looked at the boiler and attempted to seal it against blowing further

soot in case the burner did do it. It was soot from the boiler. It was the only place it could come from—the boiler and the burner. The soot was on the walls, on the window sills, tables and tablecloths and different furnishings. It was sooted up; you could see it. There was soot all around the place, there was no other place that I know of, no other stove that could have put it and it was thicker in the boiler room than anywhere else.

Then on cross-examination he testified:

That he worked out there the latter part of February or the first of March, just replaced the burner, he had nothing to do with the boiler, no knowledge of it. Knew nothing of boilers, only burners, not a steamfitter. "I don't know anything about boilers, I am no steamfitter at all. I am a technical engineer, architect and draftsman. Don't belong to any mechanic's union. The burner I took out was an oil burner, the physical dimensions of the whole (old) burner was larger than the new. He testified that he was an automobile mechanic.

Merele Wilcox testified on behalf of the defendants, that he lived at 214 66th in Fairbanks, ever since 1943, was formerly employed by Reed and Lane, plumbers and heating company. He is now working for himself at 1506 Third, has a partner by the name of Tom Wilson doing business as Economy Plumbing and Heating. He knows the plaintiffs Reed and Lane, had worked for them; knows the defendants Gilbertsons, has known them about the same length of time

he knew Reed and Lane. He worked on the Ranch job for Reed and Lane toward the last part of the job. He was supposed to be a fitter. Wilson is a plumber. He was working for Reed and Lane, he hooked up some radiators and return lines. *He examined the boiler and the boiler itself was all right so far as he knew,* it was not a new boiler, it was a used one. He sealed it up, the sections of the boiler. There was a pump on the burner in poor condition, the burner wasn't in too good a shape, *he just disconnected the pump and run it through without the pump.* He hauled it out there in a pick-up, it was stored in the Nazarene Church. (Italics ours.)

Then these questions were asked and these answers given:

Q. At the time you put in this burner, did you think it was fit and serviceable for the job it was expected to perform?

A. Well, the burner itself wasn't what, wasn't up to snuff. That is, it wasn't like a new burner. *It was an old burner, and the way I understood it—of course, I was just working there; I didn't handle any of their business, or anything—but it was a temporary set-up, so far as I know.* I don't know the full details of it though. (Italics ours.) (Tr. p. 108.)

Q. Do you think it was competent to perform the work that it was required to do.

A. Well, the burner was large enough to handle the job if it was working properly. The way things turned out, it just didn't work right. Once or twice—

or, how many times I don't know; I wasn't there—I know it didn't operate properly at all times.

Then on cross-examination he testified *that it was the understanding it was to be used as a temporary burner until a better burner could be obtained.* He put the large burner in (331) there, adjusted it to the best of his ability; it was an old burner at the time; *the new burner was taken out before he started to work.* He didn't remember who took the old burner out. The boiler so far as working right was all right. The trouble with the burner was that it was just too old. That it was just put in there for temporary use and when a better burner could be obtained it would be taken out and a new burner put in. (Italics ours.)

Tom Wilson was called and testified for the defendants: That his business is plumbing and heating. His shop is at 1513 Third; Mr. Wilcox is a partner, the witness who just left the stand. "We are in our fourth month's business." Has recently done work out at The Ranch, put in a heating system there. Got through on or about the 16th day of December. We used the unit heaters and radiators, we made a deal on the boiler, it was accepted. We put a brand new boiler in there. Personally, I am not a fitter.

Then these questions were asked and answers given (Tr. p. 112):

Q. What was the matter with the one that was in there, if anything?

Mr. Bell. We object to that as assuming a fact not in evidence, that there was anything the matter with it.

The Court. Objection overruled.

A. They claimed it wasn't heating properly.

Mr. Bell. I move to strike that; they claimed it wasn't heating properly.

The Court. It may be stricken.

Q. Don't you know generally? You don't have to go into any great details. From your examination of the heating plant there, what was wrong with the boiler?

A. Well, personally, I am not a fitter; I don't know.

Q. You couldn't say?

A. No, sir.

Q. Did you examine it?

A. I never paid any attention to it, it just was there. (332)

Q. Well, who determined to take it out?

A. The Gilbertsons.

He further testified that they wanted a system that would work; that the two of them put in the burner and the boiler; that the boiler was new; the system after put in worked good, made several trips out to verify it, everything was going along fine. Don't know the difference in capacity of the old one and the one we put in. The old one looked awful big to me. I just fixed a few leaks so far as the plumbing end was concerned. The burner we put in is using less than half

of what the other one did. *Four more radiators were put in.* (Italics ours.)

On cross-examination he testified:

We put in a hot water system. You don't have to be a steam fitter to put that in, plumbers do it. We put it in the basement of the same building. I formerly worked for Reed and Lane. *I believe Mr. Lane is a good mechanic,* the boiler he (we) put in could be used either for steam or hot water, it was about one third as big as the old boiler. (Italics ours.)

There are probably more sectional boilers installed by plumbers than by fitters, and so far as this boiler is concerned I would install a little bit smaller one with three men in a day. I have done that. It would depend on what kind of equipment you use as to whether or not it would take one hundred hours.

W. A. Montgomery was called and testified for the defendant:

That he had been in Fairbanks since the 4th of April, two years ago. He knew Reed and Lane, knew the Gilbertsons since the 10th of May, two years ago, knows the Ranch outside of town. Has had connection with the enterprise out there. Was carpenter and bartender, and overseer at times, plumber, cement man, Jack-of-all-trades, just a small amount of plumbing experience, hooking up toilets, casings, sinks and one thing or another. I have done no extensive work at it. Have met Reed and Lane several times, remembered when they worked out there. Couldn't remember the dates but they worked in November and December,

1944, putting (333) in a steam heating plant, observed the amount of time they put in from November 30, to December 5th along in there, kept track of their time, they had one or two and sometimes three men there. I think five was the most men they had there. I don't think it was over two days that they had five men. Saw Lane off and on. His time out there varied with the different times he would come out to see about and do. Heard Mr. Reed's testimony about a rail that his firm put around the place there for dancers. Didn't see Reed do it. Stated he did it. It was just a one-half inch pipe around the band, the orchestra, a pipe railing around the band, something like this raised place here. The rail is two feet high. It is still there. So far as I know he was the only man that worked on it.

On cross-examination he testified (Transcript 121): The pipe and fittings came from Reed and Lane plumbing shop, it was all short lengths, I think it was only two pieces of pipe that they cut. *Reed and Lane furnished the fittings that went in this railing.* It is a flange of some kind in the front. They furnished these flanges too. There were six galvanized floor flanges bought, but only five used. There was some three-fourths inch galvanized tees used, two and one-half inch galvanized L's used also, there were twenty-four feet of one-half inch black pipe used, *this was prepared and turned over to the witness down at Reed and Lane's shop,* it took about two hours to put it up. That he made a list of the time used by the men and his list and Reed's time cards, or Lane's time

cards were gone over by George Gilbertson and Lane together, they said they did. He wasn't present when they went over them. (Italics ours.)

Then Jack Wilson was called and testified for the defendants; he testified that he lived at 704 Thirteenth, town of Fairbanks, since '43. Came from Juneau, contractor and builder, worked for Gilbertsons out at the Ranch in 1944. Had some men out there at the time, was remodeling the interior, had between four and five men, and it gradually ran down to two, was carrying on his work while Reed and Lane were installing the heating plant. Was there some of the time while they were installing the heating plant. They were not there all the time he was working. He was delayed in his work because of them not being there to put the pipe in, his job ended in December right after the first, was there later and saw the damage, Mr. Gilbertson took him to the interior and showed him how much damage was done. It was oil soot, required considerable cleaning all through the upstairs as well as the downstairs, the floors, walls, drapes, clothing and rugs and even the door knobs were covered with it.

These questions were asked and these answers given:

Q. Well, were you there at any time when the boiler exploded?

A. It didn't exactly explode, but it would blow the oil in. As I gathered it from being in and out of there, it blew the oil in, and there was a little electrical device on the front of this nozzle that ignites the oil,

and, when the cold oil hits this hot fire brick, it creates a gas; and, if it isn't ignited immediately, why it will eventually cause explosions. Where there is too much of it in the air, it just blows soot and back fires and explodes, as you call it.

Q. Were you there at any time when the doors of the boiler——

Mr. Bell. I move to strike the answer of the witness, because it is an opinion, and he is not qualified as an engineer or an expert on oil burners or this kind of work.

The Court. Objection overruled.

Mr. Bell. Exception.

And on cross-examination, Mr. Wilson testified as follows:

I was mostly working for myself in 1944, that is building my own home until Mr. Gilbertson asked me to come out and remodel his place. I didn't do that by contract, I did it time and material. I was employed there you might say as foreman, I was to take (335) care of the men that was there. The pipe that held them up was the one going from the main steam line through the wall into the kitchen. I cut a hole in the place so that I could put the cabinets in. It was sometime in December that Mr. Gilbertson took him upstairs and showed him the soot, they were discussing it. It was after I finished my work. I wouldn't say whether it was before or after filing of this lawsuit.

On recross examination he testified, he was not interested in the outcome of the lawsuit.

Then plaintiffs moved as follows:

Mr. Bell. Comes now the plaintiff and moves to strike all of the evidence with relation to the soot or damage done to the building for two reasons: One, that it is not within the pleadings, and for the next reason that there has been no proof at all, whatsoever, of any warranty of this old second-hand burner that everyone knew was an old second-hand burner that was put in there for temporary use, and therefore, it was not guaranteed not to smoke; and it was evidently known that it was defective, or it wouldn't have been installed just for a temporary use until better burners could be obtained. Therefore, I move to strike all of this testimony as to the damage because it would not be binding on these plaintiffs, who didn't warrant this old burner not to smoke.

The Court. Motion denied.

Mr. Bell. Exception.

Then in rebuttal the plaintiffs called Hillary H. King who testified as follows:

That he is a steam fitter, has been for 18 years, has been foreman for various companies during that time, was foreman for Siems, Spokane and Drake in Kodiak for a year and a half, worked for Reed and Lane in Fairbanks, set the boiler in the place called The Ranch, is familiar with boilers, he set it to the best of his knowledge with the boiler that they had. There was no defects in the setting that he knows of; the boiler was a (336) used boiler and it would not be set like a new one. The foundation it sets on would be warped from the heat where it was previously used,

but that would not affect the boiler. It was a 26" boiler. It would be amply large to heat the building, it came out of the Alaska Airlines hangar at the airport. He set the boiler only, worked there for a few days erecting the boiler, helped transfer the boiler from the Reed and Lane Plumbing and Heating shop out to the Ranch with the assistance of the men that were under the employment of Mr. Gilbertson. They took it out there a section or two at a time, made two or three trips back and forth from the shop taking it out there. He cleaned it up and erected it inside the boiler room, cleaned it up and assembled it the way it should be, put headers on it and put pipe on that leading to the entrance of the building itself, *the work was in a first-class workmanship manner.* (Italics ours.)

On cross-examination by Mr. Clegg, he testified that he wasn't there after the boiler was fired up, never went back to work at it. Went back one time to get his overalls and jumper he had left there. Don't remember the date that he erected it. That it is the same boiler that is in dispute here that he set. The one he worked on. He worked for Siems-Drake Construction Company over at Kodiak as a steamfitter a year and a half, came from California. Siems-Drake Construction work at Kodiak, been in Fairbanks since August 1943 working for himself now, at 111 Noble Street, operates a cafe called the Diner, is the owner of it. Has not abandoned his trade of steamfitting, going back with Lytle and Green as foreman of steamfitters when they resume work this spring for the

Alaska Railroad, was employed by them last fall, also promised a job then, would have to make some other arrangements to take care of the Diner. Worked out at Alaska Airlines on the boiler for Reed and Lane. He said the boiler came from there and they took it from the Alaska Airlines down to their shop and then transferred it from there out to the Ranch. (337) The Court adjourned until ten o'clock a.m., Tuesday, February 5, 1946 at which time Joseph Lane was recalled and testified that he remembers Montgomery out at the place, he was a general handy man and did a little bit of everything. I had a talk with him the day I repaired the burner, he was there when the burner was repaired, that was the 24th day of December, 1944, as the tickets show.

Then the following questions were asked and answers given and the rulings of the Court were had:

Q. Now, in that conversation, what was said by you and what was said by Mr. Montgomery?

Mr. Clegg. We object to that as incompetent, irrelevant, and immaterial and not rebuttal.

The Court. There was no foundation laid for an impeachment either, was there?

Mr. Clegg. No, sir.

The Court. Objection sustained.

Mr. Bell. Exception.

Q. Mr. Lane, did you testify in chief as to what you did that day out there?

A. Yes.

Q. Now, did you talk to Mr. Montgomery and show him what you did?

A. Yes.

Mr. Clegg. We object to that as immaterial and irrelevant and not binding on the defendants.

The Court. Well it has been answered.

Q. Mr. Lane, in that conversation did he tell you that he had taken that electrode out two or three times and worked on it himself?

Mr. Clegg. We object to that, if the Court please, as no foundation has been laid for the question. It isn't rebuttal testimony, and it is not binding on the defendants. (338)

The Court. Objection sustained.

Mr. Bell. Exception. Your Honor, may I make an offer then? I offer to prove by this witness, if he was permitted to testify, that he had a conversation with Mr. Montgomery, who was a regular employee of the defendant in this action, and that in this conversation Mr. Montgomery told him that he had taken this electrode out and worked on it two or three times, and then when Mr. Lane examined it, it was broken—the electrode was broken—and that he repaired it; that he did not have a new electrode to substitute or replace this one, and he repaired it so that it worked good at the time and placed it back, and it worked all right at the time. I offer to prove that.

Mr. Clegg. To which we make the same objection as before.

The Court. Objection sustained, exception allowed plaintiff.

Q. Mr. Lane, you heard Mr. Gilbertson testify that there was plenty of burners in the Town of Fairbanks at that time. Is that true?

A. Not to my knowledge it isn't.

Q. Well, were you able to get any burner at that time other than what you furnished him.

A. No.

Q. Now did Mr. Gilbertson know that this was an old burner at the time you let him have it?

A. Yes.

Q. What was your conversation with Mr. Gilbertson with reference to taking out the new burner that was in the boiler, under the boiler, and placing in the old burner that was larger?

Mr. Clegg. Just a minute. We object to that as leading and suggestive, incompetent, irrelevant, and immaterial and not rebuttal.

The Court. Now is that rebuttal, Mr. Bell?

Mr. Bell. Mr. Gilbertson testified to what that conversation was, and this gentleman has a different version of what (339) the conversation was, and that he explained to him at the time that it was old and that he would let him have it, if it would work all right, until they could get another burner, and then, if they could get another burner, and then, if they could get a new burner as large as Mr. Gilbertson wanted anywhere, they would take it back, allowing him the same $100.00 for it that they charged him for it.

The Court. Objection sustained.

Mr. Bell. Exception. I offer to prove at this time by this witness, if permitted to testify that when he talked to Gilbertson about taking out the new burner that it was working all right at the time, but Mr. Gilbertson thought it was consuming too much oil

because it burned too much of the time to keep the boiler hot and wanted a larger burner, and that this witness told Mr. Gilbertson at the time that he had an old burner that he could have for $100.00 and he would take the new burner out and give him credit for the full $250.00, the amount he had charged him for the new burner, and then if he could, if Mr. Gilbertson could get a larger burner, any better burner, that Reed and Lane would take the old burner and give Mr. Gilbertson full credit for the $100.00 and would install the new burner for him at the regular and customary charges per hour for doing the work.

Mr. Clegg. To which we object, if the Court please, upon all the grounds heretofore stated and especially on the ground that it isn't rebuttal testimony, and no foundation has been laid for this question, or series of questions.

The Court. Objection sustained, exception allowed plaintiff.

He then testified that he lent the people an oil burner space heater to use during the time the work was being done and charged them nothing for it because of the fact that material wasn't available at the time and hard to get so in order to keep him going until we were able to get his heating system in why we lent him this burner. Mr. Gilbertson had his own radiators; Reed (340) and Lane furnished unit heaters was all. They were taken from the depot here directly from the depot out to Gilbertson's ranch. They were not in the original bill as submitted to Mr. Gilbertson, they were overlooked, they were eventually

billed at $195.00 for the two heaters that had been left out of the original bill to Mr. Gilbertson.

Then these questions were asked and these answers given and the rulings of the Court as follows:

Q. Mr. Lane, what was the occasion of your going out the ranch on the 24th of December, 1944?

Mr. Clegg. We object to that on the ground it is mere repetition. It has already been well covered by Mr. Reed.

The Court. Objection sustained.

Q. May I ask the question this way: Were you called by a member—were you called by Harvey Gilbertson or George Gilbertson to go out there that day?

Mr. Clegg. We object to that on the ground that it has been already answered, and it makes no difference which of the defendants did call the Reed and Lane shop.

The Court. Objection sustained.

Mr. Bell. Exception. You may take the witness.

Mr. Clegg. No questions.

Mr. Bell. We rest.

Mr. Clegg. If your Honor please, at this time we would like the privilege of reviewing our motion at the close of the main case of the plaintiffs for nonsuit on the grounds stated at that time, and on the further ground that the testimony of the plaintiffs clearly show that the so-called lien statement, this lien statement in this case, was not filed in due time, and was filed after the expiration of ninety days from the

cessation of work and furnishing of materials as alleged in the complaint, and it is, therefore, void; and there is no basis whatsoever upon which a judgment for the plaintiffs might be given to establish this lien, or alleged lien.

The Court. Motion denied.

Thereafter, and on or about February 18th, 1946, the District Judge signed and caused to be filed, findings of fact and conclusions of law.

ARGUMENT AND CITATIONS.

For the purpose of brevity I will group here for argument assignments of error, numbers one, two and three, which are:

1. That the Court erred in sustaining the defendant's demurrer on May 4, 1945.

2. That the Court erred in sustaining the demurrer to the plaintiff's complaint on the 18th day of May, 1945.

3. That the Court erred in sustaining the demurrer to the plaintiff's amended complaint on May 25, 1945.

Our statutes affecting the kind of lien herein sued on are set out above. Section 1982 sets out quite clearly who are entitled to a lien, and unquestionably plaintiffs were entitled to a lien. There being no contention that the procedure to be followed for filing and establishing the lien was not complied with as proved in Section 1987 set out above.

Then if the complaint meets the requirements of the statutes, it was error to sustain the numerous demurrers.

The statute last referred to provides that the action to enforce the lien shall be brought before the District Court and the pleadings, process and practice and other proceedings shall be the same as in other cases and also provides that in all actions under this article the District Court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien and a reasonable amount as attorney's fees and that all persons interested in the matter, in controversy on the property to be charged with the lien, may be made parties. And that the proceedings upon the foreclosure of the liens created by this article shall be, as nearly as possible, made to conform to the proceedings of a foreclosure of a mortgage lien upon real property.

Our statutes do not make any specific requirement in foreclosure of mortgage cases except as provided in Chapter CIX and especially Sections 3897-3898 of the Compiled Laws of Alaska 1933, and there is nothing required other than the general rules of pleading.

With this in mind, I can not possibly conceive of anything justifying the Court in making the three above orders sustaining the demurrers when the original complaint cointained everything that the amended complaint did except that in the amended

complaint the words were added in paragraph five "reasonable and customary." And in paragraph seven there was added the statement as follows "the sum herein sued for" and in paragraph nine, the words, "in the Territory of Alaska" were added. That to the original complaint there was attached an exact copy of the lien sued on and it was made a part of the complaint by reference. (See Par. 9, page 16.)

Plaintiffs alleged that the material furnished and labor performed was of the value of $2107.24 on which the defendants were entitled to a credit of $677.48 leaving a balance due these plaintiffs in the sum of $1429.76. (See Par. 5 on page 4 of Transcript.)

The allegation of value naturally infers, reasonable value. If it was not reasonable it would not be of that value therefore when the word value is pleaded it carried with it the presumption it is reasonable. In support of this I call your attention to *Rowland v. City of Tyler,* 5 SW (2d) 756, Second Syl. reading:

> "Value of property must be taxed under Const. Art. 8-1, means the reasonable cash market value thereof."

From the opinion on page 760 I quote:

> "It is well established that the term 'value' as used in the constitution means the reasonable cash market value."

This case cites many others with approval.

Then in *Long v. Shirley,* 14 SE (2d) 375, from the Second Syl., I quote a part thereof which is:

"Since word 'value' found in the Statute includes actual or usable value as well as market value."

It just seems a bit too technical to sustain a demurrer on such hair splitting cause and is not following the Statute which provides for liberal construction in favor of lien claimant.

Section 2093 of C. L. A. 1933 which calls for liberal construction of lien laws within this chapter, which is Chapter XXXIX including Mechanics' Liens (Art. 1 of Chapter) while 2093 was a part of Chapter 113 of Session Laws 1933, which chapter did not include mechanics' liens; yet article 1 of Chapter XXXIX of C. L. A. is derived from the mechanics' lien law of Oregon whose courts have consistently held that the Oregon Statute was to be liberally construed in favor of the lienor. That construction was adopted as a part of the Oregon law; and therefore liberal construction applies to the mechanics' lien law of Alaska, whether or not C. L. A. 1933, Section 2093 so applies.

The other reasons for sustaining the demurrer were that in paragraph 9 of the original complaint in the eighth line thereof there was omitted the words "in the Territory of Alaska" and in line 6 of paragraph 7 the words "the sum herein sued for" were omitted.

It is my contention that those words were unnecessary as the Notice of Contractors' Lien was attached marked Exhibit "A" and made a part of the complaint and this Notice of Contractors' Lien started off with the following words, "United States of

America, Territory of Alaska, Fourth Division, Fairbanks Precinct", and contained a correct description of the property to such an extent that there could never be a possible doubt as to the location of the property as there is only one Fairbanks Meridian in all Alaska.

It is plaintiffs-in-error's contention that neither of said demurrers should have been sustained and much delay was caused thereby and much time can be saved in time to come by a ruling on this question.

For further argument we will group here Specifications numbers IV, V, VI, VII, VIII, IX and X of those set forth in the Assignment of Errors commencing on page 46 of printed transcript and hereby make them a part hereof.

IV.

That the Court erred in excluding the charge tickets (225) the same being the original entries and part of the bookkeeping system of the Plaintiffs as shown as follows, to-wit: and Evidence set out in the Assignment of Error on pages 46-47-48 and 49.

V.

The Court erred in sustaining the objection of the Defendant to material, competent and relevant (228) evidence as follows, to-wit:

"Q. Mr. Lane, I mean, you have heard Mr. Clegg's statement about sending him a statement later that superseded all other statements. Who did that? Did you?

A. That is correct, yes.

Q. And is that statement based upon these particular bills as you and George corrected them that day?

Mr. Clegg. Just a moment. We object to that as irrelevant, incompetent, and immaterial and leading.

The Court. The objection will be sustained.

Mr. Bell. Exception."

VI.

The Court erred in sustaining the objection to competent, relevant and material evidence, as follows, to-wit:

"Q. What was that statement based upon, the corrected statement that was mailed to him? What was that based upon?

A. That was based upon the adjustments that Mr. Gilbertson and I made on the time cards and on the invoices.

Q. And are these the invoices that are marked Plaintiff's Identification No. 1?

A. Those are the time cards there, yes, sir.

Q. Those are the ones that were before you and Mr. Gilbertson, the ones the adjustments were made on?

A. That's right.

Mr. Bell. I again offer these.

Mr. Clegg. We make the same objection as heretofore without repeating it. (229)

The Court. I don't think these are admissible anyway, unless they form a part of the regular bookkeeping system, and in that case the first record which takes in all of the items is the correct one to introduce.

Mr. Bell. All right, your Honor, but I thought he would (did) testify they were the first entries, the original entries, in their bookkeeping system. (94.)

The Court. Yes, but each one is a separate entry. ('Statement This Cancels and Supersedes All Previous Billings' dated February 19, 1945, was marked Plaintiffs' Identification 2 by the Clerk of the court.)

Q. Mr. Lane, I hand you a statement that has been marked Plaintiffs' Identification No. 2 and will ask you to state if that is an exact copy of the statement Mr. Clegg referred to as being mailed or being given to the defendant in this case * * * the defendants?

A. Yes, that is the amended statement.

Q. Now, is that in the same condition outside of a few pencil marks along the edge, as it was at the time you made the original?

A. Yes.

Mr. Bell. Mr. Clegg, do you object to me erasing some of my own notations on the side?

Mr. Clegg. Well, they might as well stay there if you say you made them.

Mr. Bell. I put them there * * * for the record. I now offer it in evidence.

Mr. Clegg. We object to it on the grounds that no contract or agreement has been established as alleged in the complaint, and this, therefore, is (230) incompetent, irrelevant and immaterial. There is no testimony here showing there was any agreement reached as to what the terms of this alleged contract were, or what was supposed to be done by the plaintiffs in performance of the contract, or what the terms of the contract were.

The Court. The objection will be sustained, exception allowed."

VII.

The Court erred in sustaining the objection to competent, material and relevant evidence as follows, to-wit:

"Mr. Bell. Your Honor, he admits that the last material was furnished specifically in his pleadings on the 23rd day of December in paragraph 2. In paragraph two of his answer he admits that it was that day, and the evidence shows that there was material furnished on the 23rd and the 24th both. Mr. Reed showed some little thing on the 24th even, but the 23rd was the last matter that was stressed, except some small matter on the 24th, but he admits it was furnished on the 23rd, and that, of course, puts it within the period.

Mr. Clegg. If your Honor please, I would like to add a few words in explanation of that and in contradiction of it. It is true, as Mr. Bell states, that the plaintiffs having alleged that the work ceased on the 24th day of December, we admit it. We admit it clearly under mistake and misapprehension and misinformation with reference to the proof. Now they put a witness upon the (231) stand here, and he introduces the absolute records kept by the Plaintiffs in this case which shows conclusively and the testimony of the witness, in addition, shows conclusively that there was a hiatus between the 15th and 16th day of December up until the 23rd or 24th day of December, which can't be shown except by their own records, and we assumed, of, course, that when a matter of that kind is placed in a pleading that

it states the truth. Therefore, without wishing to call for an explanation of the books, or, showing of the books of the plaintiffs, the defendants erroneously admit the allegation in the complaint, that the work terminated and the materials ceased to be furnished to this property on the 23rd day of December; but we have now, your Honor, the exact testimony of the people who were supposed to know and who have kept a record of it, and by their own testimony and by their records, they show that at the time this alleged lien was filed that it was outlawed, and we certainly are not to be prohibited by insisting upon a substantial matter of that kind by an erroneous admission. It is clearly erroneous. It isn't the truth, and that is what we are here for—to ascertain what the truth is, so we ask the court to allow us to amend the answer, if necessary, in that regard, and, instead of admitting that the work ceased, let us stand upon the proposition shown by their own evidence here that the work had ceased long prior to the actual time and legal time fixed by the statute for the filing of this lien. (232)

The Court. You wish to amend that part of your answer, do you?

Mr. Clegg. Yes, sir, and show that we *deny that it was filed on the 23rd or the 24th* and insert in place of it the date shown by their own records —that it ended and terminated on the 16th day of December instead of the 23rd or the 24th, whichever the pleadings show. (Italics ours.)

Mr. Bell. I object to the amendment.

The Court. It may be amended to conform to the evidence.

Mr. Bell. Your Honor, the evidence—I want to call your attention to that—the tickets show that work was done on the 24th and he testified to it.

Mr. Clegg. Your Honor, he said he got a service call by telephone to come out there and look at it, and they went out there and charged for one hour's time. That had nothing to do with the original agreement, nothing whatever.

Mr. Bell. He went out there and did the work on the 24th. He went out and fixed something that wasn't working.

The Court. That would be just a repair job. That wouldn't be part of the original contract.

Mr. Bell. The other was within the time, the 23rd is within the time, the material and work furnished on the 23rd.

The Court. The only other, as I recall it, was something on the 20th, the 16th, and the 20th is the very last. (233)

Mr. Bell. Just wait a minute. Let me look at those cards as to dates—here is one for the 27th.

The Court. There was no evidence about it.

Mr. Bell. I offered this, though, in evidence.

The Court. It doesn't make any difference, though. It wasn't received.

Mr. Bell. Now, your Honor, may I reopen my case just to offer these particular cards?

The Court. I will permit you to reopen your case.

Joseph Lane, a witness on behalf of the plaintiffs, having been already duly sworn, on oath testified on further direct examination by Mr. Bell as follows, to-wit:

Q. I hand you a ticket, which seems to be an invoice marked Plaintiffs' Identification No. 1 in this case, and I will ask you to state if you know who made the call or did the work on that?

A. I did the work.

Mr. Clegg. Just a minute. We object to this your Honor, as supplementary to the *prima facie* case made by the Plaintiffs and serves to contradict their own testimony and is not permissible as rebuttal evidence, because there is no foundation laid for it, and otherwise, it is irrelevant, incompetent and immaterial.

The Court. No foundation has been laid for the use of any such memorandum yet.

Q. Well, is this an original, a part of the original records in your office?

A. Yes.

Q. Is that a part of the bookkeeping, general bookkeeping system of your office?

A. Yes.

Q. Now, when, and under what circumstances are (234) cards like that made?

A. They are made by the man, whoever did the work, at the time the work was done.

Q. And who did the work on the date indicated at the top of this time card?

A. I did it.

Q. Did you date it?

A. Yes, I dated it.

Q. Is it in your handwriting?

A. Yes.

Q. Now, then, did you at that time go upon the premises of the defendant at the Ranch and do work there?

A. Yes.

Mr. Bell. Now, I offer this in evidence.

Mr. Clegg. Just a minute, your Honor. Well, that is the same thing that was introduced here by Mr. Reed: call on burner, labor, one hour, service; it says 'service' and it is dated 12/24/44. That is the very identical thing Mr. Reed was talking about. We ask that it be excluded, your Honor, and disregarded entirely on the ground that it is incompetent, irrelevant and immaterial and has already been testified to by a witness on direct examination, by Mr. Reed on direct examination and cross-examination.

The Court. Objection sustained, exception allowed Plaintiff."

VIII.

The Court erred in sustaining objection to Plaintiff's evidence that was competent, relevant and material as follows, to-wit:

"Q. Mr. Lane, what was the occasion for your going out to the Ranch on the 24th day of December, 1944?

A. I was called out there because they were having trouble with (235) the oil burner.

Q. Is that the oil burner you had put in?

A. That's right.

Q. Was that a part of the regular contract work that you had done for them?

A. Well, ordinarily a service call, a service charge, wouldn't have been made there, but, due to the fact that they had taken that burner out themselves and worked on it themselves a few times, we made a service charge on that account, and it was part of the original work.

Q. And did you do the work after you got out there?

A. I did, yes.

Q. Have you ever been paid for this work?

A. No.

Q. And this is included in the work that you and George Gilbertson talked over at the time you were going over these tickets?

A. That's right.

Mr. Clegg. We object to that as irrelevant and immaterial.

The Court. Objection sustained, exception allowed Plaintiff."

IX.

The Court erred in sustaining Defendants' objection to material, competent, and relevant evidence offered on the part of the Plaintiffs as follows, to-wit:

"Q. Was this ticket present when you and Mr. Gilbertson, George Gilbertson, were going over the charges and the dispute between you as to the charges and the labor done out there?

A. Yes, it was there with the other time cards.

Q. Was it one of the cards that was agreed upon by you and Mr. Gilbertson at that time?

Mr. Clegg. I object to that as incompetent, irrelevant, and immaterial, not proper direct examination at this time, and it is outside of the issues.

The Court. I think it is also incompetent. I will sustain the objection. Exception allowed Plaintiff."

X.

The Court erred in sustaining the defendants' objection to competent, relevant and material evidence, as follows, to-wit:

"Q. You did work on the 24th day of December, 1944, for the defendants in this case?

A. Yes.

Q. And that was the occasion for making this particular charge?

A. Yes.

Mr. Bell. We re-offer the card in evidence.

Mr. Clegg. We object to it on all the grounds already stated, your Honor, and that it is not proper rebuttal evidence, and that there is no foundation laid for its introduction. It has already been testified to by one of the witnesses on the case in chief. It is incompetent, irrelevant and immaterial.

The Court. Objection sustained, exception allowed Plaintiff.

Mr. Bell. Your Honor, may I say this, please: It is not rebuttal evidence. You allowed me to re-open my case in chief, and this is evidence after you have permitted an amendment in your answer.

The Court. I am not ruling on it on the ground that it is rebuttal. I ruled on it on the other grounds, exception allowed Plaintiff." (237)

The plaintiffs produced each and every time card, plaintiffs both testified as to their system of bookkeeping and that each of these cards were made at the time the work was done by the person doing it and each were identified by the man making it and on each occasion the man making the time card testified that it was correct, that the time was actually put in; that the charge was correct; that the card was a part of their regular bookkeeping system; that it

was an original and first entry; that the cards were each in the same condition as they were when made and were made in the regular course of plaintiffs' business. The exhibits are now before this Appellate Court (thanks for an order of this Court requiring that they be sent here) show for themselves to be clean, clear and unambiguous with no mutilations or damage thereto and are as originally made.

After those time cards and invoices were fully identified they were offered at various stages of the trial and even after the witness Lane had testified that the original time cards and invoices were before Mr. George Gilbertson and himself and each item and charge was examined by the two of them and certain corrections made, on a few of the invoices and where then by them considered correct and then since George Gilbertson had failed to deny this and in the main had admitted it, they were again offered in evidence and an objection was sustained to their admission.

Then the particular ticket dated December 24, 1944, was offered separately and the Court sustained the objection to it. After Mr. Lane had identified it as having been made by him on the day the work was done and testified that it was the original entry, was a part of their regular bookkeeping system, made in due course of business, was correct in every way, that he had done the work in pursuance of a call from the defendants and the charge made therefor was the regular and customary charge made for that kind of services at Fairbanks, Alaska, at that time.

In *Jones on Evidence,* Vol. 2, at page 1083, you find this statement:

> "However admissible entries are not confined to mercantile transactions; they may relate to the accounts of persons generally, where goods, services or materials have been furnished. It makes little difference in what capacity services have been rendered, provided they have been performed in the regular course of business."

and I quote from page 1078 of the same book:

> "Although books are admittedly more satisfactory where it appears that they have been kept in the form of daily entries of debit and credits in a day book or journal, this is not essential. They may have been kept in the form of a ledger, if this is the general mode in which the party keeps his books—provided that the entries are original entries. The book may take the form of a Time Book evidencing not only the labor of the plaintiff but that of his apprentice or assistant as well. * * *"

The controlling federal statute on the subject is as follows, Par. 695 of U.S.C.A. 28, found in *Cumulative Annual Pocket Pact 1945,* reads as follows:

> Writings and Records Made in Regular Course of Business.
>
> 695. Admissibility.
>
> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or

event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "Business" shall include business, profession, occupation, and calling of every kind. (June 20, 1936, c. 640, par. 1, 49 Stat. 1561.)

This section has been construed by the Appellate Courts many times but we will quote from only a few:

From *Hoffman v. Palmer et al.,* 129 Fed. (2d) at page 976, the 7th Syl. is:

In federal statute rendering admissible any record made in regular course of any business, if it was regular course of such business to make such record, the words "regular course of business" are not colloquial words, but are words of art, and should be given their judicially settled meaning in absence of a contrary legislative intention clearly expressed in the statute or its legislative history. 28 U.S.C.A. Par. 695.

Then in *Harper v. United States,* 143 Fed. (2d) 795, from page 806 we quote:

(26-28) The purpose and effect of this statute is to make admissible any writing if made in the

regular course of any business without the strict proof of authenticity, which had theretofore been required. Palmer v. Hoffman, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A.L.R. 719.

Then we quote from *Ulm v. Moore-McCormack Lines, Inc.,* 115 Fed. (2d) 492. The 5th Syl. thereof reads as follows:

5. Evidence Key 376(6), 377
The objective of statute providing for admissibility as evidence in any court of the United States of a memorandum or record of any act, transaction, occurrence, or event made in regular course of business was to do away with technical rulings which excluded records ordinarily used in business transactions when not formally identified by the makers. 28 U.S.C.A. Par. 695.

From the body of the opinion we quote:

(5) Plaintiff asserts that, since this act is similar to the New York statute of 1928, Civil Practice Act, Par. 374a, it must have been copied therefrom and should receive the similar restrictive interpretation which that statute has received, citing particularly Johnson v. Lutz, 253 N. Y. 124, 170 N. E. 517, and Geroeami v. Fancy F. & P. Corp., 249 App. Div. 221, 291 N. Y. S. 837. But this act did not come from the New York statute. Both in fact derived from the activities of a committee of experts on the law of evidence appointed by the Commonwealth Fund of New York, who, in 1927, published a model act for "Proof of Business Transactions." Morgan and Others, The Law of Evidence: Some Proposals for Its Reform, c. V, p. 63. See 5 Wigmore on Evidence (3rd Ed. 1940) Par. 1520.

The objective, as Wigmore so lucidly explains, was to do away with the technical rulings which excluded records ordinarily used in business transactions when not formally identified by the makers.

The Commonwealth Fund's proposal became the model for the New York, the federal, and some half dozen state statutes, and has led to further like proposals which seem to have met with the universal approval of those interested in law reform. Thus, the National Conference of Commissioners on Uniform State Laws has recommended for general adoption a Uniform Business Records as Evidence Act, along similar lines, which has already been enacted in several states. A like proposal appears in Barrow, Business Entries Before the Court, 32 Ill. L. Rev. 334. All these proposals were approved and recommended by a distinguished committee of the American Bar Association's Section on Judicial Administration, supported by an advisory group of 44, in a report in 1938 which was approved by the section and by the House of Delegates of the Association. 24 A.B.A.J. 726, 751, 752; 63 A.B.A. Rep. 525, 682; 5 Wigmore on Evidence Par. 1520. The restrictive interpretation of the statutes embodying this new reform in New York and elsewhere has been the subject of caustic comment by Dean Wigmore on "the perverse stolidity of the juristic mind." Ibid Par. 1520. He holds the particular decisions relied on by plaintiff to be contrary to the express words of the statute. Ibid. Par. 1530a; cf. also Roge v. Valentine, 255 App. Div. 475, 7 N. Y. S. 2d 958, which he cites as "another instance of judicial statification."

In Hunter v. Derby Foods, Inc., 2 Cir., 110 F. 2d 970, 973, we supported a broad interpretation of this statute justifying the admission of a coroner's certificate embodying an opinion or conclusion as to ground or cause of death of a deceased, even though the New York precedent might cast doubt on this conclusion. Compare Johnson v. Lutz, supra; Beglin v. Metropolitan Life Ins. Co., 173 N. Y. 374, 66 N. E. 102; Flynn v. Metropolitan Life Ins. Co., 252 App. Div. 78, 297 N. Y. S. 349; but see Scott v. Empire State Degree of Honor, 204 App. Div. 530, 198 N. Y. S. 535. But whatever should be the judicial attitude toward this statute, we do not think the cited New York cases are in point on the immediate issue here. They did not involve the problem of identification, but only whether or not opinion statements of a doctor and of a policeman contained in official or business records were admissible. Here the records were claimed primarily to show direct observations made by attending physicians, not entries of opinions.

There are many State Court decisions in point and I believe the old case of *Patrick v. Tetzlaff,* found in 189 Pacific at page 115, is about as near in point with the facts here as any of the cases we have been able to find. From this case I quote Syl. 1 and 2 as follows:

1. Evidence Key 376(6) — Oath that original books regularly kept are correct not required.

Where the original character of the books of a tradesman or shopkeeper is proved, and it is shown that they have been regularly kept follow-

ing the usual course of business of the person producing them, an affirmative oath on the part of the tradesman or shopkeeper keeping them that they are absolutely correct is not required to render them admissible in evidence and prima facie proof of the items disclosed thereby.

2. Evidence Key 355(1), 383(7) — Cards on which workmen entered time and from which account was made up constituted prima facie proof.

Where under the system employed in a repair shop workmen entered the time they were employed on particular jobs on cards over their signatures, and the bookkeeper made up the total charge from such cards, *the cards constituted original memoranda of the items of the account for the amount of labor performed and were prima facie proof thereof.* (Italics ours.)

From the body of the opinion we quote:

It would be to impose a most difficult rule upon the commercial world to hold that, notwithstanding ample proof as to the original character and regularity of the keeping of accounts, there must be in addition an affirmative oath on the part of the tradesman or shopkeeper producing them that they are absolutely correct. In large establishments employing a great multitude of clerks this proof would be in many cases beyond reach. We think that the cards offered in evidence constituted original memoranda of the items of the account for the amount of the labor performed, and that they were prima facie proof of the fact. White v. Whitney, 82 Cal. 166, 22 Pac. 1138; Carroll v. Storck, 57 Cal. 366.

Other State Court cases in point are:

Pacific Mutual Life Ins. Co. of Cal. v. O'Neil, 130 Pac. 270;

Clayton Coal Co. v. King et al., 113 Pac. (2d) 672;

G. S. Wood Mercantile Co. Reinc. v. Dougall, 114 Pac. (2d) 202;

School District No. 1, Apache County v. Whiting, 107 Pac. (2d) 1075.

Permit us to quote from a well recognized authority, *Nichols Applied Evidence,* Vol. 1, 799, par. 42:

> Par. 42.—Cards as original entries. Where under the system employed in a repair shop workmen entered the time they were employed on particular jobs on cards over their signatures, and the bookkeeper made up the total charge from such cards, the cards constituted original memoranda of the items of the account for the amount of labor performed and were prima facie proof thereof.

It is our contention that the Court erred in its rulings as above set forth.

I will group for argument specifications of error set out in the assignments of error, pages 60, 61 and 62 which are specification numbers XIII, XIV and XV, which are as follows, to-wit:

Specification Number XIII.

> The Court erred in denying plaintiff's motion to strike as follows, to-wit:

Mr. Bell. I move to strike all of his testimony about the boiler not working, the burner not working, and the sooting of the place, for the reason that it is outside of the issues, and there is no dispute, there is no contention that it was a contract to do anything except furnish some labor and material; and this is not defensive matter, because if they had made a contract to do some particular thing for a certain amount, it would be an implied warranty that it would work, but there is no testimony of any implied warranty, and I move to strike that part of the answers.

The Court. Motion denied.

Mr. Bell. Exception. (239)

Specification Number XIV.

The Court erred in overruling plaintiff's objection to incompetent, irrelevant and immaterial and prejudicial testimony as follows, to-wit:

Q. How did that dirt and soot originate? What was the cause of that?

A. I really don't know, only when it would shut down and then start up, it would just blow off the doors, or open, rather, and then just a lot of soot would come out all over.

Q. Was your interior perceptibly hurt?

A. Yes.

Mr. Bell. I object to that as incompetent, irrelevant and immaterial and not within the pleadings.

Q. Just generally speaking.

The Court. Objection overruled.

Mr. Bell. Exception.

Specification Number XV.

The Court erred in overruling plaintiff's motion to strike all of the evidence with relation to soot or damage as follows, to-wit:

Mr. Bell. Comes now the plaintiff and moves to strike all of the evidence with relation to the soot or damage done to the building for two reasons: One, that it is not within the pleadings, and for the next reason that there has been no proof at all, whatsoever, of any warranty of this old second-hand burner that everyone knew was an old, second-hand burner that was put in there for a temporary use, and therefore, it was not guaranteed not to smoke; and it was evidently known that it was defective, or it wouldn't have been installed just for a temporary use until (240) better burners could be obtained. Therefore, I move to strike all of this testimony as to the damage because it would not be binding on these plaintiffs, who didn't warrant this old burner not to smoke. (And all of this testimony went in over the objections of the plaintiffs.)

The Court. Motion denied.

Mr. Bell. Exception.

This is so apparent and based upon elementary law that citations thereon to the Court would not be necessary and we presume not appreciated. It is an elementary principle of law that a person furnishing labor to do and act under the supervision of the person for whom the work is being done, does not warrant that the production, when finished, will be fit for the purpose for which it is being constructed. That responsibility rests upon the supervisor and in

our case the supervisor was furnished by the defendants and the plaintiffs were specifically told that no supervision would be expected or paid for and to supplement this position we call your attention that there never was a contract either oral or in writing to do any specific and definite thing. The only contract was to furnish certain articles of material and to do certain labor. All of this to be furnished and done at the instance and request and under the general supervision of George Gilbertson, the principal defendant. There isn't a scintilla of evidence anywhere that the defendants ever represented any of the materials furnished as being fit and proper for the use and desire of the defendants, who were in equally as good a position to know what they wanted as were the plaintiffs and since the defendants specifically directed the plaintiffs that they wanted no supervision, and would not pay therefor, it would be a severe stretch of imagination and a misinterpretation of the law of warranty to hold that the plaintiffs warranted this old second-hand burner not to smoke or soot up the place, and to strengthen this position there is no cross-petition or counter-claim in the answer of the defendants and none would have been proper under the peculiar statutes of Alaska and the rulings of that particular Court, to-wit: The Fourth Judicial Division, in which it has continuously held that an action in damage being a jury case and an action in equity being a non-jury case; that the two could not be combined for any purpose and have repeatedly so held. That a counter-claim or offset

based on law could not be pleaded as a defense to an action in equity and therefore it is the natural presumption of the plaintiffs that that is the reason that the defendants here did not plead in their answer a cross-petition or counter-claim for damages. Therefore, any evidence introduced along that line was incompetent for several reasons and especially for the following reasons:

a. That there is no pleading to justify its introduction.

b. That due to the peculiar rules of this particular Court it could not have been pleaded as a counter-claim, offset or defense.

c. Such a pleading would of necessity be, either an affirmative defense, pleaded, specifically, as an affirmative defense, or it would have to be set off as a counter-claim or offset and none of these things were done.

d. There was no contract to do anything except furnish some labor and material and therefore there was no implied warranty that this old burner would not smoke, especially in view of the fact that all the parties testified that they knew that this was an old defective burner and Joseph Lane testified that he informed George Gilbertson that it was defective, and this was never denied.

And coupled with this is the evidence of the defendants and their employees, others than the plaintiffs having worked on this burner at various times and on one occasion Joseph Lane found the electrode

broken. Therefore, the motions to strike set forth in specifications of error Nos. 13 and 15 and the objection to the introduction of testimony as set out in specification of error No. 14 should have been sustained by the trial Court, said contention being reasonable, proper and just under the law, and the rulings thereon were error.

We will group here for argument specifications of error Nos. 16 and 17.

Specification Number XVI.

The Court erred in sustaining the defendants' objection to the plaintiffs' offer to prove as follows, to-wit:

Mr. Bell. Exception. Your Honor, may I make an offer then? I offer to prove by this witness, if he was permitted to testify, that he had a conversation with Mr. Montgomery, who was a regular employee of the defendants in this action, and that in this conversation Mr. Montgomery told him that he had taken this electrode out and worked on it two or three times and that when Mr. Lane examined it, it was broken—the electrode was broken—and that he repaired it; that he did not have a new electrode to substitute or replace this one, and he repaired it so that it worked good at the time and placed it back, and it worked all right at the time. I offer to prove that.

Mr. Clegg. To which we make the same objection as before.

The Court. Objection sustained, exception allowed plaintiff.

Specification Number XVII.

The Court erred in refusing the plaintiffs' offer to prove as follows, to-wit:

Mr. Bell. Exception. I offer to prove at this time (241) by this witness, if permitted to testify, that when he talked to Gilbertson about taking out the new burner that it was working all right at the time, but Mr. Gilbertson thought it was consuming too much oil because it burned too much of the time to keep the boiler hot and wanted a larger burner, and that this witness told Mr. Gilbertson at the time that he had an old burner that he could have for $100.00, and he would take the new burner, and then if he could if Mr. Gilbertson could get a larger burner, any better burner, that Reed and Lane would take the old burner and give Mr. Gilbertson full credit for the $100.00 and would install the new burner for him at the regular and customary charges per hour for doing the work.

Mr. Clegg. To which we object, if the court please, upon the grounds heretofore stated and especially on the ground that it isn't rebuttal testimony, and no foundation has been laid for this question, or series of questions.

The Court. Objection sustained, exception allowed plaintiff.

These specifications of error set out above speak for themselves. The plaintiffs in error endeavored to prove the facts set out in each of these offers by competent questions and objections thereto were sustained by the Court. They were each competent and proof of these facts should have been permitted and there-

fore we will ask the Court to consider them as having been proven as the rules of this Court permit. Assuming that the Court considers this competent evidence in this hearing then it is clear that Mr. Montgomery, who was a regular employee of the defendants in this action, had taken the electrode out and worked on it two or three times and had broken it and then on the 24th day of December, 1944, Mr. Lane was called there to repair this burner and found the electrode broken and a new electrode not being obtainable, he repaired it so it worked good at the time and placed it back.

And it will be assumed that the Court will consider the offer in specification of error No. 17 to the effect that Lane talked to George about taking out the new burner that was working all right at the time and that George thought that it was consuming too much oil because it burned too much of the time to keep the boiler hot and he, George, wanted a larger burner and that Lane told Gilbertson that he had an old burner that he could have for $100.00 and would take the new burner out and give him credit for the full $250.00, being the full amount charged for the new burner, and if Mr. Gilbertson could get a larger burner or any better burner that Reed and Lane would take the old burner and give Mr. Gilbertson full credit for the $100.00 and would install the new burner for him at the regular and customary charges per hour for doing the work. This never has been disputed by the defendants and all of the testimony that has gone in along this line has sustained practi-

cally every word of the offer; therefore, the new burner furnished by Reed and Lane, that was working, was removed at the instance and request of Gilbertson because he thought it was consuming too much oil, because it burned too much of the time to keep the boiler hot.

Could it be said that there was any contract either direct or inferred that the plaintiffs would warrant this old burner to be fit and proper for the purpose, that George Gilbertson wanted it for? On the contrary, George Gilbertson was a steamfitter with authority to select the equipment that he wanted and presumably with the ability to make the selection wisely. And it could not be said that the plaintiffs ever warranted this old burner, but on the contrary placed it there at the instance and request of George Gilbertson after warning him of its defectiveness and to be used only as a temporary setup, and then the defendants, through their own fault by failing to pay the plaintiffs for the work and material furnished, brought about a lawsuit by which the plaintiffs attempted to collect for their labor and material furnished and the defendants had the use of the temporary setup for approximately a year.

The greater share of the equipment being admittedly satisfactory for temporary use and the only part of the equipment that was defective, if we take the defendants' own statements for it, was this burner for which they were charged $100.00, therefore the offer to prove should have been accepted, the evidence was proper under the condition of the record at the

time the offer was made. We contend that the Court erred in denying the offer.

At the close of the testimony the trial judge took the case under advisement and then some time later during the month of February, 1946, he entered a findings of fact and conclusions of law which are set out in the transcript commencing at page 26. Then a motion for new trial and an amended motion for new trial were filed and overruled by the Court. (Tr. pp. 31 to 39.) Which motions for new trial are made a part of this argument, which is based upon assignments of error Nos. XVIII and XIX, which assignments of error are directed at the errors made by the Court in the findings of fact and conclusions of law which will be hereinafter pointed out to the Court under subdivisions of this group of assignments of error.

A.

First the Court made a finding that: "Between the 16th day of August, 1944, and the 20th day of December, 1944, inclusive, plaintiffs and defendants, George Gilbertson and Harvey Gilbertson, entered into an oral agreement whereby plaintiffs agreed to furnish *an adequate first class heating system* for the building of said defendants, known as The Ranch, upon the land described in the amended complaint herein and to install the same in said building and that said defendants agreed to pay therefor the reasonable and customary value of the same." (Tr. p. 27.)

There is positively no evidence whatsoever to cause the trial Court to arrive at this finding of fact. There is not a word of evidence that the plaintiffs ever "agreed to furnish an adequate first class heating system" but each and every part of the evidence is either silent on this question or absolutely to the contrary. The evidence clearly shows that during the summer and fall of 1944 that heating equipment was so scarce in Alaska that second-hand equipment was picked up wherever it could be and this is sustained by the testimony of both the plaintiffs and defendants. George Gilbertson testified that they had a second-hand boiler that they had gotten from a fire somewhere; also some radiators and other equipment. Mr. Lane testified that he recommended a hot water system and the principal defendant, George Gilbertson, testified he was a steamfitter of experience. They agreed on the hot water system when the water could be removed from the basement. There is a clear inference from the testimony that the basement could not be dried out and a lean-to building was constructed by the defendants. Then a hot water system was not then practical and a steam system was put in instead. The testimony shows clearly that George Gilbertson examined this second-hand boiler and sent his own men after it and agreed upon the price to pay for the boiler before it was ever used or taken by him. The evidence shows conclusively that oil burners were hard to get and that the plaintiffs succeeded in getting four of the same size from Seattle, Washington. That one of these burners was sold to

the defendants for $250.00. The testimony stands undisputed that a good man, Hillary H. Kling, a steamfitter of eighteen years' experience, a former foreman for Siems, Spokane and Drake of Kodiak, installed that boiler, that the boiler would be amply large to heat the building. It came out of the Alaska Airlines hangar. That he cleaned it up and assembled it the way it should be assembled. That the work was in first class workmanship manner and no competent person ever testified or even insinuated that this was not true. Mr. Lane testified that the boiler was set correctly. He testified to years of experience in that line and no one ever disputed this. That he recommended a hot water job because it was more economical to operate. This couldn't be done until the basement was dried out. That Mr. George Gilbertson wanted unit heaters and that he later talked it over with Mr. Gilbertson and a hot water job could not be put in the lean-to. That there was nothing said about supervision to start with but later Mr. George Gilbertson specifically told him he wanted no supervision. Mr. Gilbertson being a steamfitter himself, plaintiffs never charged for supervision. That the defendants did some of the work themselves. That the plaintiffs sent men there to do the work as Mr. Gilbertson wanted it done. That he told Mr. Gilbertson that the charges would be $3.00 per hour and Mr. Gilbertson said go ahead with it. That he did the work in compliance with Mr. Gilbertson's request. That the material listed in the identification was actually used and went into the building. That he and

George Gilbertson went over the list, piece by piece, went over the entire building there, went over the hours of labor, in the conference, made a few corrections therein. That the labor record kept by Mr. Gilbertson did not quite tally with his labor record. That he made a concession to Mr. Gilbertson thereon, which concessions are shown in the statement. (Transcript pp. 98 and 99.) He testified further that the new burner worked correctly and produced the necessary heat but that it ran more of the time than George thought it should and George thought it was using too much oil and that *George* wanted a larger burner. He testified that no other burners were available except an old second-hand burner. That he understood that the defendants were going to take the boiler out later and put it in the basement. The first burner put in was new and bought from LaPere & Walker. Plaintiffs bought four of them; oil burners were hard to get at the time. It was there for a week or two. It was taken out at the request of Mr. Gilbertson, who said it was too small; however, it was doing the work at the time. It ran a good time without shutting off and that is why he (Mr. Gilbertson) decided it was too small and he wanted it out of there.

Mr. Gilbertson and Mr. Lane made a deal on the old burner. Mr. Lane testified, "I told him at the time that the burner was an old one and that it was the only burner that was available. If he wanted the burner changed and if he wanted this old one that was in poor shape I would put it in and, at such time as he or I could get ahold of another burner, I would

allow him the price of the burner back, and that was satisfactory, the $100.00 with return guaranteed; and when we put another burner in there he was to return that burner and get $100.00 back." (Tr. pp. 110 and 111.)

Mr. Gilbertson told me to put the old burner in. I told him that the burner was too old and would never do the work. (Tr. p. 111.) That it was the only burner available at that time. We put it in at his instructions. He was the one who wanted it and that after the work was finished and a short time before the lien was filed, he and George Gilbertson went over the bill together and agreed thereon.

George Gilbertson, the principal defendant, testified that he became acquainted with the plaintiffs about the time he hired them to put the plumbing and heating in. We had the job and we wanted to get done so we hired Lane and Reed and they agreed to put the job in.

That he had a boiler out there and some radiators and fittings that we had bought down at a place that had burned up. (Tr. p. 137.) I told him we wanted a heating plant, we wanted a good plant in there, a plant that would keep it warm. * * * It couldn't keep the place warm. It was put in by Lane and Reed. They put a new oil burner in to start with. He was supposed to put in an outfit that would work. (This was purely a conclusion and not competent evidence.) It didn't work. We paid part of it at the time and a little here and a little there when they needed some money. * * * I understood there was a heating plant

to be put in there. So far as I know, when it was through and finished, and if it was a good job I would pay for it. (Tr. pp. 138 and 139.) This is not evidence of a contract or agreement but his own conclusion and not competent as evidence.

That he, George Gilbertson, was a steamfitter in good standing. Then this question was asked:

Q. It did keep the boiler hot when it did run practically steadily, didn't it?

A. Well, yes and no.

He then testified that he understood that the big burner was an old burner. Then this question was asked:

Q. When it was working, it heated the boiler adequately, didn't it?

A. *When it did work, yes.* (Italics ours.)

Then this question was asked:

Q. Now when you hired them to do the work out there, it was—they didn't make a contract to furnish you any particular thing or to do any particular thing? You hired them to go out there and work at so much an hour and furnish certain materials?

A. He had us charged up, to start with, on supervision, and we had that cut off. * * *

Q. What did you tell Mr. Lane about supervision?

A. I called him up. He was giving us, just like the Walker Construction Company gave us, a little run-around out there. They agreed to do a job for $1000.00 and we ended up paying $1700.00. I told him, "Don't go pulling a Walker Construction trick on us, because we won't agree to it."

Q. Then did you explain to him what you meant? Did you talk to him about supervision?

A. He tore those cards up; I believe he did, because he never charged us out with it after that.

Q. Mr. Gilbertson, you told him you didn't want to be charged any more with supervision?

A. We didn't feel like paying three and a half an hour for supervision.

Harvey Gilbertson testified that the plaintiffs were to put in a heating plant. We had to have a heating plant and went to them about it; they said they would put one in; they did it, but it never did work. (This is jut a conclusion and not evidence. There is no showing that Harvey was competent to judge.) They put in a boiler and an oil burner to heat it and some radiators and pipes. We already had those but some of them I guess they furnished, those that were shipped up here. (Tr. p. 163.) That they used the heating plant a little less than a year and put in another one, a hot water job.

Now this is all of the testimony that I am able to find that would in the slightest degree lend support to the findings of fact above set forth and there is not a scintilla of evidence anywhere to the effect that the plaintiffs agreed to furnish an adequate first class heating system for the building of the defendants, known as The Ranch, but there is plenty of evidence to the effect that there was no such an agreement and the finding of fact is directly contrary to the evidence and is without support therein.

Subject to the approval of the Court I would like to cite the law and decisions following all of the subdivisions and not repeat it at the close of each, for the sake of brevity, and therefore will set out the law that we rely upon following the other subdivisions of this group.

B.

The trial Court erred in the second finding of fact, to-wit: "Plaintiffs installed an alleged heating system in said building; that the same was not adequate to heat said building and was not a first class job but, in fact, was not of any reasonable value whatsoever, except the two unit radiators which were of the reasonable value of $195.00." This finding of fact is error and there is nothing in the pleadings in the case to justify the introduction of any evidence and no evidence was introduced that would in any way sustain this finding of fact. The only allegation in the answer that could be argued as justifying such a finding of fact would be that found in paragraph 4 of the answer, which reads: "The said contract contemplated a good, sound first class job on the part of the plaintiffs (another conclusion, not a pleading of fact) and plaintiffs wholly failed to perform their contract in this regard, as heretofore alleged in paragraph 1 hereof." And paragraph 1 merely sets forth an admittance of the defendants to the effect that the plaintiffs were hired to do certain plumbing, steam fitting and metal work and furnish certain materials, including efficient heating plant. That being the only allegation in the pleading on which to base this finding.

In the first place this finding of fact is a presumption, based upon a presumption. First it must be presumed that there was a contract to do a particular thing in a particular way and second, a presumption that the defendants failed to perform their part of said contract and it is true that a presumption may be based upon a fact proven, but a presumption based upon another presumption is insufficient to sustain a finding of fact. There is, literally, not one word of evidence to sustain a finding that there was a contract to do a first class job in installing a heating plant in said building. But as pointed out above the fall of the year was coming on and the defendants were building a road house near the Town of Fairbanks with a bar room, a dance hall and an iron railing between a part thereof, and the Court will take judicial knowledge of the severity of the weather in and around Fairbanks, Alaska, and the testimony is undisputed to the effect that there was an extreme shortage of heating equipment in that vicinity and, in fact, there was a general shortage of heating equipment throughout the United States at that time and the undisputed testimony shows this shortage of materials. The defendants themselves testified to obtaining a part of this material from the ruins of a burned building. That Mr. Lane recommended a hot water system but the basement was full of water and this could not be installed and something in the nature of a temporary heating plant had to be installed and it was understood that what was done would be removed later and a better plant put in.

There was never any contract to do any particular thing except to furnish certain labor and certain materials for the defendants. The supervision of the work was rendered by George Gilbertson and if the old burner was defective it was his responsibility. This is not denied anywhere but is testified to by both plaintiffs and defendants. It must also be borne in mind that they used this heating system for a year and then did install a hot water system in the basement of the building where they originally intended that it should be. There was no evidence whatsoever anywhere to the effect that this heating plant was not of any reasonable value whatsoever except the two unit radiators. But on the contrary this plant furnished defendants service for one year. Therefore this finding of fact has no evidence whatsoever to sustain it and is specifically contrary to the evidence and should be reversed. The most damaging evidence that anyone testified to is set out above in subdivision "A" and I make it a part of this subdivision "B" by reference as fully as if set out here again, and there is nothing to sustain this finding anywhere.

C.

The Court erred in making the finding of fact No. 3 in the following:

> "That said defendants detached from said building and premises, and refused to keep the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and for which plaintiffs had charged said defendants the

sums of $175.00 and $100.00 respectively; that said defendants tendered said boiler and oil burner, as personal property, back to plaintiffs, and the same are now their property."

In the first place, there was no pleading to justify such a finding; there is not a word in the answer to that effect. In the second place there was no competent testimony upon which to base it, and third, it would be an equivocal conclusion to find that the boiler and oil burner, which were unquestionably, a part of the real estate at the time of the filing of this lien and the suit to enforce it, were detached and became chattel property and were accepted back by the plaintiffs when there is no evidence to sustain such a finding and is therefore an error on the part of the trial judge, and the finding of fact is not proper and should not be sustained, as it is not only contrary to the great weight of the evidence, but there is no evidence to sustain it and no pleading to justify the introduction of any such evidence and plaintiffs objected to any and all evidence concerning same, and then moved to strike all testimony that in any way touched thereon.

D.

The finding of fact number 4 to the effect, "That between the 16th day of August, 1944 and the 20th day of December, 1944, both dates inclusive, plaintiffs and said defendants entered into an oral contract whereby plaintiffs agreed to furnish and install certain plumbing and sheet metal in said Ranch building, and said

defendants agreed to pay therefor the reasonable value thereof." Finding of fact number 5 following this one: "That, pursuant to said last mentioned agreement, plaintiffs furnished and installed said plumbing and sheet metal in said Ranch building, the last material being furnished and the last labor in the installation of the same being done upon the 20th day of December, 1944", and number 6 following: "That the reasonable value of said plumbing and sheet metal and the installation of the same was as shown upon Plaintiffs' Exhibit A introduced in evidence herein, to-wit: $326.79, composed of the following: Plumbing, $57.00; Well point, $8.00; Xzit, $2.00; Spray pump, $1.00; 2-inch coupling, $1.10; Fittings, $13.30; Balance on electric range, $50.00; Fittings, $3.15; Sheet metal, $191.24."

And finding number 7 following, to-wit: "That plaintiffs' lien claim in this action having been filed for record upon the 21st day of March, 1945, was filed more than ninety days after the last work or last material was furnished under said contracts, and, therefore, was filed after the time allowed by law for filing such a lien claim."

And finding of fact 8: "That upon the 24th day of December, 1944, plaintiffs made a service call to adjust or repair the oil burner at said Ranch building and made a charge of $3.00 therefor; that said charge was not pursuant to the above mentioned contracts, or either of them, and formed no part of the performance of either of said contracts, and no lien claim was

filed for said $3.00 charge." It seems to be a violent presumption and not based upon the evidence and is contrary thereto. I have grouped these assignments of error for argument to save space in the brief and so that it can be made more clear to the Court. There is no evidence at all of any separate contract for the plumbing and sheet metal work. There is no evidence that there was any separate and distinct agreement, order or contract of any kind to separate the plumbing work and sheet metal work from the heating work. The evidence clearly shows that the work was all done on what is known to the parties hereto as a time and material job in which the time was to be at $3.00 per hour and the material at the regular and customary price charged for similar material in the vicinity of Fairbanks, however, practically all of the material used was purchased by the defendants from the plaintiffs at an agreed price as is shown by all of the evidence. The boiler, the burner, the plumbing, the unit heaters, all were picked out and the price agreed upon by the parties and that all of the labor was furnished as service and furnished upon call of the defendants and the undisputed evidence is that on the 24th day of December a man working for the defendants, having tampered with and tried to fix the oil burner, had broken the electrode and the plaintiffs were called there to make the heater plant work and Mr. Lane testified and it stands undisputed that he went there and did the work on the 24th day of December, 1944, at the instance and request of the defendants. And that he made a ticket out showing a charge of $3.00

on that date and this ticket was offered and reoffered in evidence repeatedly and was always refused admission by the Court even though it was identified as being made at the time the work was done in the due and regular course of business and was a part of the permanent records and bookkeeping system of the plaintiffs and was made in compliance with their regular system of bookkeeping and was the first and original record made of said transaction and that the charge made therefor was reasonable and customary. The work was done and that they had never been paid therefor.

Now the Court's finding that the lien filed on the 21st day of March, 1945, was filed more than 90 days after the last work or material was finished on said contracts and therefore filed after the time allowed by law for filing such lien claim.

There were seven days left in December, thirty-one in January, and twenty-eight in February, and twenty in March, the lien having been filed on the 21st day of March, which made only eighty-six days, and the law specifically allowed ninety (90) days for the filing of the lien; therefore, the seventh finding of fact is unquestionably based upon the fifth finding of fact that the last plumbing and sheet metal work was done on the 20th day of December, 1944, and the trial judge has evidently either overlooked, or wished to disregard the evidence showing the labor done on the 24th day of December, 1944, that is either admitted or stands undenied throughout the entire evidence.

It will be noticed that the testimony of Mr. Lane, also the testimony of Mr. Reed, stand undisputed that the whole job was done just as a service job according to their custom, or a time and material job, and that the work done on the 24th of December was done just like the rest and under the same circumstances, and at the request of the defendants.

F.

As the conclusion of law No. 1 found in transcript at page 30, which is as follows:

> "That plaintiffs have no lien upon said Ranch building or premises described in the amended complaint herein, and that they take nothing by this action",

is purely erroneous and is based upon findings of fact that are contrary to the evidence and supported by no evidence and this conclusion of law is wrong. There is no evidence, not the slightest word thereof, to the effect that the plaintiffs ever agreed to do anything for the defendants except furnish some labor and some material. The greatest share of the material furnished was examined and the price agreed upon by George Gilbertson at the time the arrangement for the delivery thereof was made.

Therefore, there was no contract to put in a heating plant in any particular method. There was an order to install a boiler to put in a certain burner that George Gilbertson picked out and paid for in the sum of $250.00. There was an order made by George

Gilbertson cutting off all supervision after informing the plaintiffs that he was a steamfitter, experienced in that line, and the supervision was assumed by him. This is undisputed and is even corroborated by George Gilbertson himself in his testimony. There was no implied warranty that this boiler was adequate, however, there is plenty of evidence to the effect that it was adequate and there is not a scintilla of evidence anywhere to the effect that the boiler was defective or inadequate in any way. There is some evidence that the second burner installed, the old second-hand burner, that was sold to the defendants, by which they agreed to pay the sum of $100.00 which has never been paid, was defective.

It was a violent conclusion and no evidence was admitted to sustain it. If George Gilbertson was a competent steamfitter as he claimed to be, he was capable of giving evidence as to the truth of what was wrong with the old big burner. Joseph Lane testified that he told George Gilbertson that this burner was an old, defective burner and that George Gilbertson wanted it put in and Lane told him that they would put it in for him for temporary use and that as soon as either the defendants or the plaintiffs could obtain another burner that this old one would be taken out and defendants would be given credit for the full $100.00 therefor.

Now this has not been denied and stands admitted here. Even Harvey Gilbertson testified that he knew it was an old second-hand burner at the time they

bought it. It is so apparent from the evidence and the reasonable inferences to be drawn therefrom that there was a determined effort on the part of the defendants to defeat these plaintiffs and to prevent paying them for their labor and material furnished. All of this seems to be a result of revenge due to the filing of the lien as shown in the testimony of George Gilbertson. Now unquestionably after the work was all done, Joseph Lane and George Gilbertson went over the bills, over the labor tickets and invoices and agreed after a few minor corrections that they were correct and that $1429.76 was the balance due thereon and this is further supported by the fact that the plaintiffs waited until their lien right was near an end before filing their lien, evidently expecting to receive pay for their work and material.

Conclusion of law number 1 to the effect that the plaintiffs have no lien upon the Ranch building or premises and that they take nothing by this action is an improper conclusion of law to be based upon the facts as shown by the testimony and upon the pleadings in the case.

G.

The second conclusion of law, to-wit: That said defendants have paid in full all sums due to plaintiffs upon their contracts, is equally as biased and exemplifies the prejudicial feeling of the trial judge in this case as strongly as conclusion of law number 1, and is not based upon any competent evidence and should be reversed by this Honorable Court.

I.

Conclusion of law number 3 to the effect that the boiler and oil burner which were detached from said heating system by said defendants are the property of the plaintiffs, is the most erroneous conclusion of law that I can think of. There is not a scintilla of evidence anywhere to the effect that there was anything wrong with the boiler and, on the contrary, the fact that it was used for approximately one year and then replaced by a hot water system installed in the basement, goes to show that they merely carried out their original arrangements to install and use a temporary heating plant, made up of second hand equipment since new and better equipment was unavailable.

And the equivocal conclusion that the oil burner and boiler were detached from the heating system which had become a part of the real estate to which it was attached and become a part thereof, and the conclusion that this boiler and burner, and the boiler in particular, after having been used for about one year, and served the purpose for which they were installed, were the property of the plaintiffs, is in circumvention of all the recognized principles of law effecting mechanic's liens. If this was the law, any plumber or steamfitter would be unsafe in installing and furnishing plumbing fixtures or steam fixtures in any home because the man to whom it was furnished could refuse and neglect to pay therefor, until a suit was filed, as was done in this case, and then go out and disconnect the fixtures, and then say to the person who in-

stalled them, "You can't recover in your action because I have disconnected them from the real estate and you can take back your fixtures." If this was the law, it would nullify all of the efforts of the legislative bodies throughout the United States in their endeavor to establish a law to protect the contractor and the laborer by the passing of proper lien statutes.

This heating system became a part of the real estate, was used in this roadhouse, dance hall and bar for about a year, and must have been of valuable service to the defendants herein, and naturally when the war was over and more equipment was available and possible for the purpose of defending in this lawsuit and without the knowledge or consent of the plaintiffs, did install in the basement a hot water system which they would like to have done in the first instance and unquestionably the plaintiffs would also have liked to have done this job with new and adequate equipment but it was unavailable.

Now as to conclusion of law 4. "That said defendants are entitled to recover from plaintiffs their costs and disbursements of this action" and 5, "that judgment and decree may be entered accordingly", are, of course, based solely on the findings of fact and the 3 first conclusions of law. And if the findings of fact and the conclusions of law are vacated or set aside these particular conclusions of law, 4 and 5 will fall therewith.

I am not unmindful of the equity rule that findings of fact and conclusions of law are binding on the

court if supported by evidence and are not against the clear weight of the evidence and clearly erroneous. But in view of the many cases holding that the appellate court, in determining whether the district court's findings are correct or clearly erroneous within the court rule, may examine the evidence and if the findings of fact or any of the material findings of fact sufficient to affect in any way the judgment are wrong or against the clear weight of the evidence or unsupported by any competent evidence, then the finding or findings are clearly erroneous and against the clear weight of the evidence. In support of this contention I quote from *Fleming, Adm'r of Wage and Hour Division, Dept. of Labor, v. Palmer, et al.* The first and second syllabus read as follows:

1. Courts. Key 406(1¼).

Under rule that fact findings, in trial by court without a jury, shall not be set aside unless clearly erroneous, a finding of fact is "clearly erroneous" if it is against the clear weight of the evidence, and it does not suffice that it is supported by evidence. Federal Rules of Civil Procedure, rule 52(a), 28 U.S.C.A. following Section 723c.

See Words and Phrases, Permanent Edition, for all other definitions of "Clearly Erroneous".

2. Courts. Key 406(1¼).

In determining whether District Court's finding in nonjury case is correct or "clearly erroneous" within court rule, appellate court may examine documentary evidence, which it is as competent to consider as the

District Court, and testimony on which there is no conflict. Federal Rules of Civil Procedure, rule 52(a), 28 U.S.C.A. following Section 723c.

And from the body of the opinion on page 751, we quote:

> "Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c. *A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence.* (Italics ours.) Aetna Life Ins. Co. v. Kepler, 8 Cir., 1941, 116 F.2d 1; State Farm Mutual Automobile Ins. Co. v. Bonacci, 8 Cir., 1940, 11 F.2d 412; Manning v. Gagne, 1 Cir., 1939, 108 F.2d 718; Fed. Rules of Civil Procedure and the American Bar Institute Proceedings, p. 316 et seq. (Cleveland, 1938); Clark & Stone, Review of Findings of Fact, 4 U. of Chi. L. Rev. 190 (1937)."

Certiorari was denied by the United States Supreme Court in the above case and the order of denial is found in 316 U. S. at 662.

From the cases referred to I quote from *Aetna Life Ins. Co. v. Kepler,* 116 Fed. (2d) page 1. This opinion is by the fine old gentleman, Judge Sanborn, and seems to clearly point out the reason for the change in the rules of considering cases tried by the court without a jury. The third and fourth syllabus reads as follows:

> 3. Courts Key 406 (1¼)
>
> Under federal rule of civil procedure that fact findings shall not be set aside unless clearly

erroneous, Circuit Court of Appeals is no longer merely court of error which considers only law questions in jury-waived cases, but acts as court of review in all nonjury cases in accordance with practice which formerly prevailed in equity appeals. Federal Rules of Civil Procedure, rule 52(a), 28 U.S.C.A. following Section 723c.

4. Courts Key 406(1¼)

In nonjury case, trial court's fact findings, unsupported by substantial evidence, clearly against weight of evidence, or induced by erroneous view of law, are not binding on Circuit Court of Appeals.

And from the body of the opinion on pages 4 and 5, I quote:

(3). Prior to the effective date (September 16, 1938) of the Rules of Civil Procedure, the findings of fact of a trial court, in an action at law tried without a jury, were as conclusive, upon review, as a verdict of a jury, and could not be set aside by the reviewing court if there was any substantial evidence to support them. *A different rule prevailed in equity cases. The findings of fact of the trial court in such cases were presumptively correct, and, unless clearly against the weight of the evidence or induced by an erroneous view of the law, would not be disturbed by a reviewing court.* (Italics ours.)

Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, provides: "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

The effect of Rule 52(a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury The standard adopted was that which had always prevailed in equity.

This Court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all nonjury cases in accordance with the practice which formerly prevailed in equity appeals. (Italics ours.)

(4). The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, *are not binding upon this Court.* (Italics ours.)

This is stated clearly in *State Farm Mut. Automobile Ins. Co. v. Bonacci, et al.,* 111 Fed. (2d) 412, and from the body of the opinion we quote on page 415, which is as follows:

"The new practice, now incorporated in the Civil Procedure rules, accords with the decisions on the scope of the review in modern Federal equity practice, and applies to all cases tried without a jury, whether legal or equitable in character, and whether the finding is of a fact concerning which the testimony was conflicting or of a fact inferred from uncontradicted testimony."

"Under the new practice, where findings are made by the court without a jury, *the appellate court is not limited to the mere question whether there is any substantial evidence to support them,*

but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the special qualifications of the trial judge to pass on credibility."

It seems that the 7th Circuit adhered to the same rule in the case of *J. S. Tyree, Chemist Inc. v. Thymo Borne Laboratory,* 151 Fed. 621.

I know that the 7th Circuit has very recently passed on this same question in the case of *Chatz v. Armour Plant Employees' Credit Union,* 154 Fed. 236, 1 syl.

1. Courts Key 406(1¼)

"A challenge of a finding of fact must be examined on appeal where the appellant asserts that the District Court's finding is unsupported by substantial evidence or is contrary to the clear weight of the evidence or is induced by an erroneous view of the law." Federal Rules of Civil Procedure, rule 52, 28 U.S.C.A. following Section 723c.

Since there is no evidence to sustain the findings of fact and since they are clearly against the weight of the evidence, and there are so many errors in the admissibility of evidence wherein competent and relevant evidence has been excluded and incompetent evidence admitted. It is quite apparent that there was some prejudice in the action of the trial Court or a clear mistake of law which resulted in an injustice to the plaintiffs. The testimony showed clearly an adjustment of the account after all the work was done and this was never directly denied by the defendants, and it was supported by the amended statement which

was in the possession of the defendants at the time of trial.

The testimony of the damage done by smoke not being competent either under the laws of Alaska or the pleadings in the case, there being no evidence upon which a warranty could be justly based, and no evidence of the denial of the account as agreed upon after the work was finished, it was error of the Court to make the findings of fact as made and to render a judgment denying these plaintiffs recovery for the labor and material furnished when the evidence shows conclusively that it was put in as a temporary heating unit to be later substituted by a plant in the basement and since it was used a year by the defendants the walls and linens would naturally need cleaning.

It is appellants' contention that this honorable Court should reverse this case and render a just and reasonable judgment granting the plaintiffs a recovery for their labor and material, establishing their lien and allowing them a reasonable attorney's fee for handling this case, both in the lower Court and in this Court.

Dated, Fairbanks, Alaska,
October 30, 1946.

Respectfully submitted,
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